COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2016-P-0981

COMMONWEALTH OF MASSACHUSETTS,
Appellant,

V.

RANDALL D. TREMBLAY,
Defendant-Appellee

BRIEF AND APPENDIX FOR THE COMMONWEALTH ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

SUFFOLK COUNTY

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ISSUE PRESENTED

I. Whether the motion judge erred in concluding that the Commonwealth did not meet its burden to demonstrate that the defendant had made a knowing and voluntary waiver of his *Miranda* rights when he chose to speak with detectives twice in the aftermath of the murder and voluntarily made statements to the police.

II. Whether the motion judge further erred in suppressing the results of forensic testing revealing the victim's DNA profile on the defendant's lawfully seized clothing.

STATEMENT OF THE CASE

On March 10, 2015, a Suffolk County grand jury returned indictments charging the defendant with murder, in violation of G.L. c. 265, § 1, and violating an abuse prevention order, in violation of G.L. c. 209A, § 7 (C.A. 12-13).[1] On September 29, 2015, the defendant filed a motion to dismiss the indictments and a motion to suppress evidence and

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[1] References to the Commonwealth's record appendix will be cited by page as (C.A. __). References to the motion to suppress transcript will be cited by page number as (Tr. __), and references to the Motion to Suppress Exhibits will be cited by number as (Exh. __).

statements, along with a memorandum of law and a supporting affidavit (C.A. 13, 17-24). On November 24, 2015, the Commonwealth filed oppositions to the motion to dismiss and the motion to suppress (C.A. 33-45). On November 30, 2015, the defendant filed a supplemental memorandum in support of his motion to suppress (C.A. 13, 25-32).

On November 30, 2015, the Superior Court (Salinger, J.) heard argument concerning the motion to dismiss (C.A. 13). Additionally, an evidentiary hearing was conducted concerning the motion to suppress (C.A. 13). Following the hearing, on December 9, 2015, the Commonwealth submitted supplemental memoranda in opposition to the motion to dismiss and the motion to suppress (C.A. 13, 46-48).

On December 20, 2015, the motion judge issued findings of fact and rulings of law allowing, in part, the motion suppress statements and allowing the motion to suppress the results of forensic testing on clothing lawfully seized from the defendant (C.A. 1-11, 13). The motion judge also issued an order denying the defendant's motion to dismiss (C.A. 13-14). The Commonwealth received these decisions on

December 24, 2015, and filed a timely notice of appeal on December 29, 2015 (C.A. 53-54).

On December 30, 2015, the Commonwealth filed a petition for interlocutory review of Judge Salinger's partial allowance of the defendant's motion to suppress (C.A. 55-87). The defendant opposed the petition on January 8, 2016 (C.A. 88-96). On January 20, 2016, the Honorable Geraldine Hines allowed the Commonwealth's petition, and ordered that it proceed in this Court (C.A. 97).

On February 12, 2016, the defendant petitioned the Single Justice for leave to file a cross-appeal, seeking interlocutory review of Judge Salinger's partial denial of the motion to suppress (C.A. 98-112).[2] He also moved to consolidate his petition with the Commonwealth's petition (C.A. 98-105). The Commonwealth did not oppose the petition and, on February 24, 2016, the Honorable Robert Cordy allowed it and, like the Commonwealth's appeal, ordered that it proceed in this Court (C.A. 113-14).

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[2] The defendant did not seek review of the denial of the motion to dismiss.

On July 19, 2016, both cases were entered in this Court (C.A. 113).

STATEMENT OF FACTS

The defendant has been indicted for the murder of Stephanie McMahon in November, 2014. The cause of the victim's death was blunt force trauma to the head. Stephanie McMahon and the defendant, Randall Tremblay, were involved in an on-and-off romantic relationship. The relationship was troubled, and at the time of her death, the victim had an active restraining order against the defendant.

I. The Motion Judge's Factual Findings.

Based on the testimony at the suppression hearing and the video recording[3] of the defendant's second interview, Judge Salinger made the following findings of fact:

> The Court heard testimony from Boston Police Sgt. Scott Yanovitch, Ofc. Shawn Roberts, and Sgt. Det. Michael Stratton during an evidentiary hearing held on November 30, 2015. The Court credits their testimony to the extent it is consistent with the explicit findings of fact made below. In addition, the Court received into evidence a number of exhibits. The Court makes the following findings of fact based on this

[3] The second interview was admitted at the motion to suppress hearing as Exhibit 4, a copy of which is appended to the instant brief.

evidence and on reasonable inferences it has drawn from this evidence.

1.1. Initial Response to Crime Scene. Shortly after 2:00a.m. on Tuesday, November 18, 2014, the Boston police received a 911 call reporting that a woman had died at a home in the Hyde Park section of Boston. Ofc. Landrom and two Emergency Medical Services ("EMS") personnel responded to the scene first.

They found the victim, Stephanie McMahon, lying dead on a very bloody couch with a blanket over her. McMahon's face was bruised and bloodied. Michael Doucette and Gay Finley were in the apartment. Ms. Finley had called 911.

Sgt. Yanovitch arrived just after EMS had pronounced McMahon to be dead. Yanovitch asked the police dispatcher to issue "full notifications," which means that the police have found a dead person and that all relevant units, including a homicide detective, should respond to the scene. Yanovitch spoke separately with Doucette (who smelled of alcohol and acted intoxicated) and Finley (who did not). The full notifications went out around 2:50 a.m. Sgt. Det. Michael Stratton of the homicide unit was notified about the matter by page. He drove from his home in Hopkinton to the crime scene.

Ofc. Roberts and Ofc. Laden[4] [sic] were on patrol together that night in a marked police cruiser. Roberts recognized the Hyde Park address because he had been there a couple of months earlier when McMahon reported that her window had been damaged. He kn[e]w from that prior call that Ms. McMahon had called the police on several occasions regarding alleged domestic violence against her by Randall Tremblay. As a result, when Roberts heard by radio the issuance of "full notifications" for McMahon's address, he used his mobile data terminal to look up previous police reports regarding that address. That led him to check

[4] The correct spelling of the officer's name is "Layden."

Tremblay's online criminal record. Roberts learned that there was an active restraining order requiring Tremblay to stay away from McMahon's residence, as well as an active arrest warrant against Tremblay for failing to register with the sex offender registration board. Roberts was able to pull up and view one or more booking photos of Tremblay, so he now knew what Tremblay looked like.

1.2. Tremblay's Behavior at the Crime Scene. Over the next hour or so Sgt. Yanovitch observed a man who turned out to be Mr. Tremblay hanging out near Ms. McMahon's apartment. The first time, Yanovitch had stepped outside the apartment to get some fresh air when he noticed Tremblay walk past. Tremblay was talking and mumbling to himself.

The second time, Doucette asked if he could go outside to smoke a cigarette. Yanovitch went with him. Tremblay again walked by, still talking to himself. Tremblay asked Doucette for a cigarette. Yanovitch told Tremblay to move along. At around this time, Roberts completed his online research of McMahon and Tremblay, and contacted Yanovitch by radio to report what he had learned. Roberts explained the apparent history between McMahon and Tremblay, and informed Yanovitch about the restraining order and arrest warrant that had been issued against Tremblay. Sgt. Yanovitch asked Ofc. Roberts to come to the Hyde Park address, take a look at Doucette, and determine whether he looked like Tremblay. Roberts arrived at the scene a few minutes later. He told Yanovitch that Doucette was not Tremblay, and did not appear to have been involved in any of the prior domestic violence incidents against McMahon. Roberts then left the scene. Yanovitch and Doucette went back inside the apartment.

The third time, Yanovitch was inside the apartment when he heard someone yelling loudly outside. Yanovitch went out and discovered that Tremblay was doing the yelling. Tremblay was on the sidewalk yelling things like "What's going on in there?", "I know what happened," and "She was my friend." Tremblay then walked up to Yanovitch and

again asked "what's going on in there?" and again said "she was my friend." Yanovitch asked Tremblay "What's your name?" Tremblay did not answer, but instead said "What, are you going to run me?" Yanovitch then radioed Roberts and asked him to come back to the scene to determine whether this second man was Tremblay. By now it was around 3:40 a.m.

When Ofc. Roberts and Ofc. Laden [sic] returned to McMahon's apartment, Mr. Tremblay was still with Sgt. Yanovitch. Roberts recognized Tremblay from his booking photo. Roberts told Yanovitch that the man who had been yelling was Tremblay, and that there was an outstanding arrest warrant against him.

Roberts and Laden [sic] approached Tremblay. Roberts could smell alcohol on Tremblay. Roberts told Tremblay that he had an outstanding arrest warrant, and that he was therefore under arrest. He and Laden [sic] placed Tremblay in handcuffs. Tremblay said he had paperwork in his pocket showing that the arrest warrant had been recalled. Roberts looked at the paperwork and saw that it concerned a different warrant. But he nonetheless took Tremblay's ID, went back online using the mobile data terminal in his cruiser, and confirmed that there was an active warrant for Tremblay's arrest. Roberts then read Tremblay his Miranda rights from a laminated card. Tremblay never said whether he understood those rights or not.

Roberts and Laden [sic] drove Tremblay to Boston Police headquarters in their marked police cruiser. Tremblay was in the rear seat and was handcuffed during this ride. During the drive, Tremblay kept asking if he was going to be released, because the arrest warrant was a mistake. Tremblay said nothing about McMahon's death during this ride. Upon arrival, the officers brought Tremblay to the homicide unit on the second floor.

The police also transported Doucette and Finley to police headquarters to be interviewed by a homicide detective. The detectives interrogated Tremblay before speaking with Doucette or Finley. The Commonwealth

presented no evidence regarding what, if anything, the police learned from Doucette or Finley either at the crime scene, later at police headquarters, or at any other time.

1.3. First Interrogation of Tremblay. Sgt. Det. Michael Stratton interviewed Mr. Tremblay in an interview room for about an hour, beginning at around 4:30 a.m. (The Court credits the date and time stamp on the recording of the wrong room, and does not credit the inconsistent time that someone wrote on the Miranda form discussed below). Stratton believed that the interview was being recorded. Unfortunately, whomever (sic) turned on the recording equipment did so for the wrong interview room. The room where Gay Finley was sleeping was recorded for that hour. Stratton's interview of Tremblay was not. Stratton took no notes, because he thought the interview was being recorded. Although no other police officer was present in the interview room with Stratton and Tremblay[5], Ofc. Roberts observed and listened to the interview on the recording system's monitor outside the interview room.

At the beginning of this first interview, Sgt. Det. Stratton told Tremblay that the interview was being recorded. He then read Mr. Tremblay his Miranda rights from a preprinted form. Tremblay put his initials next in each spot that Stratton told him to initial, and signed his name where Stratton told him to sign. Over the next hour, Tremblay made statements implicating himself in McMahon's death. Tremblay said that he had been with McMahon Sunday night, that they got into an argument, that he used his hands to strike McMahon in the head twelve to fifteen times, that Tremblay "got her good," and that "I think I killed her." Tremblay told Stratton that when he woke up Monday morning McMahon's body was cold and he believed she was dead, that Tremblay then left the apartment

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[5] Judge Salinger's finding on this point is clearly erroneous. Detective David O'Sullivan was also present in the room when the defendant was first interviewed (Tr. 88). Detective O'Sullivan did not testify at the motion hearing.

and found Mr. Doucette, that they drank some beer together, and that Tremblay, Doucette, and Doucette's friend returned to McMahon's apartment. Tremblay said he mopped up some big puddles of blood in the apartment and took out some trash. Tremblay also said that he drank some more beer in the apartment, finishing the last one just before Finley called 911. The Court credits Ofc. Roberts testimony that during the whole time that Tremblay was confessing he had killed McMahon, he still kept saying that the warrant for his arrest for failing to register as a sex offender was a mistake, and he still kept asking when he was going to be release[d].

For the reasons explained below, the Court finds that Tremblay was intoxicated throughout this first interrogation.

1.4. Cigarette Break. After Stratton completed the interview and left the interview room, he learned that the wrong room was recorded. Stratton was upset. He went back to Tremblay, explained that the interview had accidently not been recorded after all, and asked Tremblay if he would agree to a second interview, to go over the same things that Tremblay had already explained to Stratton, but this time to have it all be recorded. Tremblay said that he wanted to have a cigarette first.

Ofc. Roberts and Ofc. Laden [sic] then brought Mr. Tremblay to a fire exit door so that he could smoke a cigarette. They handcuffed Tremblay's wrists together in front of his body.

During this ten minute break, Tremblay kept asking when he was going to get out. Tremblay did not understand that he had just incriminated himself by confessing he had killed McMahon, that his statements were going to be used against him, and that therefore the police were not going to let him go but instead were going to hold him and charge him with killing McMahon.

1.5. Second Interrogation of Tremblay. Stratton interviewed Tremblay a second time, beginning around

5:50 a.m. The second interview was recorded. Having viewed and listened to the entire recording several times, the Court finds that Tremblay was quite intoxicated throughout that interview and that he did not knowingly and intelligently waive his Miranda rights.

Sgt. Det. Stratton never asked Mr. Tremblay if he had been drinking alcohol, had taken any kind of legal or illegal drugs, or was unable to focus or understand what was happening for some other reason. The Court finds that Stratton knew that Tremblay had been drinking, that he should have known that Tremblay was acting like he was drunk or similarly incapacitated, and that Stratton therefore should have asked Tremblay questions to determine whether Tremblay was intoxicated and whether he had the capacity to understand what he was doing in waiving his Miranda rights. The Court finds that Stratton never did so.

When Tremblay was brought back to the interview room, he walked past Michael Doucette, who was eating somewhere nearby. Tremblay tried to get food from Doucette. At one point Tremblay said to Doucette, "Mike, give me an English muffin, will you?"

Tremblay was stumbling around and very unsteady on his feet when he was brought back into the interview for the second interrogation. In the recording of this interview Tremblay sounds drunk and seems to have trouble speaking clearly, as Sgt. Det. Stratton is taking off his handcuffs. Once his cuffs are off, Tremblay had great difficulty walking just a few steps to his seat. He stumbles several times before managing to sit down.

Tremblay asked "Am I out of here or not?" Stratton replied "Pretty soon." Tremblay then asked "Straight up?" It is apparent that Stratton[6] (sic) still did not understand that having incriminated

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[6] This appears to be a typographical error in the motion judge's findings. It is clear from the context that he is discussing the defendant, and not Sergeant Detective Stratton.

himself by confessing that he beat McMahon to death he was not going to be released.

Once Tremblay was seated, he paid very little attention while Stratton tried to review the Miranda form with him. At some point Tremblay reached across the table and started playing with Stratton's pen and the papers he had in front of him. Stratton did not ask Tremblay to sign a new Miranda form, but instead shows Tremblay the one he previously signed. Stratton finally gets Tremblay to say that he understood all of his Miranda rights. The Court finds, however, that Tremblay was not focused at this point and was paying very little attention to the rights that Stratton read to him from the Miranda form.

During the second interview, Tremblay once again admits that he repeatedly hit McMahon in the head, and in so doing he killed McMahon. At one point Tremblay said "She's dead because of me." At another he said "I did whack her." Stratton has Tremblay explain in some detail exactly what Tremblay recalled happening the night he killed McMahon, and what Tremblay did after waking up the next morning and finding that McMahon was dead.

Although Tremblay again admitted that he had killed McMahon, during the second interview Tremblay kept asking when Stratton is going to let him go. Toward the end of the second interview Tremblay said ''You're gonna let me go now, right?" and "Let me walk out of here." After the interview was completed, and Stratton was guiding Tremblay out of the interview room, Tremblay kept asking when Stratton was going to let him go.

The Court finds that at the end of the second interview Tremblay still did not understand that he had incriminated himself, and that police were going to use Tremblay's statements against him, and that the police were going to arrest Tremblay for killing McMahon and thus would not be letting him go.

Since it is apparent that Tremblay was quite intoxicated throughout the second police

interrogation, the Court infers and therefore finds that he was even more drunk during the first interview.

1.6. Arrest of Tremblay for Murder and Seizure of his Clothing. Based on Tremblay's statements, Sgt. Det. Stratton arrested Mr. Tremblay for murder. The police brought Tremblay downstairs for full photographs, not just the standard booking photos. Stratton saw that one of Tremblay's sneakers and one of his socks appeared to have blood on them. Based on Tremblay's admissions during the two interviews, Stratton seized all the clothing that Tremblay was wearing at that time. The police performed various forensic tests on that clothing, and determined that every article of clothing Tremblay had been wearing tested positive for the presence of human blood. The police never sought or obtained any search warrant before testing Tremblay's clothing.

(C.A. 1-8).

II. The Motion Judge's Rulings of Law.

Judge Salinger denied the defendant's motion with respect to statements that the defendant made prior to being placed in custody and interviewed at Boston Police Headquarters (C.A. 1, 8, 11). He allowed the motion with respect to custodial statements that the defendant made during both the first unrecorded interview and the second recorded interview (C.A. 1, 8, 11). He credited the testimony of Sergeant Yanovitch, Officer Roberts, and Sergeant Detective Stratton "to the extent it is consistent with the explicit findings of fact" (C.A. 8).

He ruled that the Commonwealth had not met its burden of proving that the defendant had made a knowing and voluntary waiver of his *Miranda* rights at any time (C.A. 8). He determined that the defendant was "far too intoxicated" to be able to make a knowing and voluntary waiver of his rights to remain silent and to speak with counsel during both the first and second interviews, and that Sergeant Detective Stratton knew or should have known that the defendant was "quite intoxicated" and should have stopped the interviews (C.A. 1, 9). Judge Salinger further ruled that the "inadvertent failure to record the first interview of Tremblay at police headquarters leaves substantial doubt as to whether Tremblay made a knowing and intelligent waiver" of his rights during the first interview and that the police could not "cure that problem" with a second interview that again began with "yet another attempt to get [the defendant] to waive his *Miranda* rights" (C.A. 10).

With respect to the defendant's clothes, Judge Salinger ruled that the police lawfully seized them under the exigency exception to the search warrant statute, but were required to seek a warrant before

conducting any forensic testing (C.A. 10). He thus suppressed the forensic test results of the blood stains on his clothing (C.A. 10). He determined that the police did not have probable cause to arrest the defendant for murder, absent the statements, and that the search incident to arrest exception did not apply because the defendant was arrested for failure to register as a sex offender and there was no reason to believe that the seizure would lead to evidence of that crime (C.A. 10-11).

ARGUMENT

I. THE MOTION JUDGE ERRED IN CONCLUDING THAT THE COMMONWEALTH DID NOT MEET ITS BURDEN TO DEMONSTRATE THAT THE DEFENDANT MADE A KNOWING AND VOLUNTARY WAIVER OF HIS *MIRANDA* RIGHTS BEFORE SPEAKING WITH DETECTIVES TWICE IN THE AFTERMATH OF THE MURDER.

In reviewing a motion to suppress, a court will accept the motion judge's findings of fact unless there is clear error and "make an independent determination of the correctness of the judge's application of constitutional principles to the facts as found." *Commonwealth v. Tremblay*, 460 Mass. 199, 205 (2011); *accord Commonwealth v. Mercado*, 422 Mass. 367, 369 (1996). "Where the motion judge's findings

of fact are premised on documentary evidence, however, the case for deference to the trial judge's findings of fact is weakened." *Commonwealth v. Clarke*, 461 Mass. 336, 340 (2012). Thus, this Court will take "an independent review" of the video evidence as it is "in the same position as the [motion] judge in viewing the videotape." *Id.* at 341 (citations omitted).

Here, the motion judge's subsidiary factual findings and legal conclusion that the defendant was too intoxicated to make an intelligent and voluntary waiver of his *Miranda* rights and to make voluntary statements during both interviews are based upon a clearly erroneous determination as to the defendant's condition as depicted in the video. This Court is in as good a position as the motion judge, and upon its own independent review of the videotape should conclude, contrary to Judge Salinger, that the defendant's waiver of *Miranda* was intelligent and voluntary and that his statements themselves were voluntary.

A. The Motion Judge Erred Because The Defendant Knowingly, Intelligently, And Voluntarily Waived His *Miranda* Rights.

The motion judge wrongly concluded that the Commonwealth did not prove beyond a reasonable doubt that the defendant validly waived his *Miranda* rights (C.A. 11). The defendant's *Miranda* waiver form (Exh. 1 at C.A. 51), the video depicting the recorded interview (Exh. 4), and the totality of the circumstances contradict the motion judge's findings and conclusion and require reversal.

Both the United States Constitution and the Massachusetts Declaration of Rights prohibit the government from compelling criminal defendants to provide incriminatory evidence against themselves. U.S. Const. amend. V; Mass. Const. pt. 1, art. XII. To ensure that a criminal defendant is not compelled to provide self-incriminating testimony in derogation of these rights, a layer of prophylaxis is required, including the so-called *Miranda* warnings. *Maryland v. Shatzer*, 130 S. Ct. 1213, 1219 (2010); *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966). Under *Miranda*, the Commonwealth must prove beyond a reasonable doubt that the criminal defendant voluntarily, knowingly,

and intelligently waived his rights before it can use a statement elicited during custodial interrogation against the defendant at trial. *Commonwealth v. Hensley*, 454 Mass. 721, 730 (2009); *Commonwealth v. Jones*, 439 Mass. 249, 256 (2003). Even after a defendant waives these rights, he may thereafter assert them at any time during the interrogation. *Miranda*, 384 U.S. at 473-74; *Commonwealth v. Obershaw*, 435 Mass. 794, 800 (2002); *Commonwealth v. Fowler*, 431 Mass. 30, 37-38 (2000). In determining whether police officers adequately conveyed the *Miranda* warnings, "reviewing courts are not required to examine the words employed 'as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably conve[y] to [a suspect] his rights as required by *Miranda*.'" *Florida v. Powell*, 130 S. Ct. 1195, 1204 (2010), quoting *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989).

In the present case, the Commonwealth acknowledges that the defendant's interview at the Boston Police station amounted to custodial interrogation necessitating *Miranda* warnings and waiver. Viewed objectively and in totality, however,

the video recording of the defendant's interview establishes beyond a reasonable doubt that the police provided the defendant the requisite *Miranda* warnings, the defendant understood the warnings, he waived his *Miranda* rights intelligently and voluntarily, and his ensuing statements themselves were voluntary. Contrary to the motion judge's findings, the defendant's consumption of alcohol hours prior to the interrogation did not render him so intoxicated as to preclude his intelligent and voluntary waiver of *Miranda*, or the voluntariness of the statements themselves.[7]

An objective viewing of the video recording of the defendant's interview establishes the following beyond a reasonable doubt. Sergeant Detective Stratton reviewed the Boston Police Department *Miranda* Warning form with the defendant before beginning both interviews -- even though the defendant had received *Miranda* warnings when he was arrested on a warrant

[7] Indeed, notwithstanding the judge's view that the defendant was so intoxicated as to preclude an intelligent and voluntary waiver of *Miranda*, the judge did not find the defendant's intoxication to render his statements to the police at the scene involuntary, and altogether fails to address voluntariness in his rulings of law.

just a few hours earlier for failure to register as a sex offender[8] (C.A. 4, 5, 7, Exh. 1 at C.A. 51).

During the unrecorded statement, Sergeant Detective Stratton read the defendant his *Miranda* rights, and the defendant initialed and signed the form (C.A. 5).[9] During the recorded video, Sergeant Detective Stratton went through each of the *Miranda* rights with the defendant: the right to remain silent and that anything the defendant said could be used against him in court; the right to ask a lawyer for advice before questioning or to have a lawyer present during questioning; that if he could not afford a lawyer, one would be provided at no cost; and the

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[8] The motion judge's finding that, when given *Miranda* warnings at the scene, the defendant did not acknowledge that he understood the warnings is immaterial as no custodial interrogation occurred at that juncture.

[9] Contrary to the conclusion of the motion judge, the "inadvertent failure to record the first interview of Tremblay at police headquarters" does not leave substantial doubt as to whether Tremblay made a knowing and intelligent waiver" of his rights (C.A. 10). The failure to record the first interview was clearly inadvertent, and the judge did not find otherwise. In that posture, the failure to record it has no bearing on the intelligence and voluntariness of the defendant's waiver and statements. Indeed, the crux of the judge's findings and rulings rest on the erroneous premise that the defendant was too intoxicated to understand the warnings, to waive *Miranda*, and to make statements voluntarily.

right to stop questioning at any time (Exh. 1 at C.A. 51, Exh. 4). Again, the defendant clearly reiterated that he understood his rights and the judge's finding that he was not paying attention to the warnings is belied by the recording (Exh. 4) and thus clearly erroneous. The defendant initialed and signed the *Miranda* waiver form during the first interview, reviewed the form during the second, and confirmed that he understood the rights that he was waiving (Exh. 1 at C.A. 51, Exh. 4). *See e.g.*, *Commonwealth v. Perez*, 411 Mass. 249, 255 (1991), citing *Commonwealth v. Day*, 387 Mass. 915, 919-20 (1983) ("We have ruled the use of a card containing the *Miranda* warnings sufficient to advise a defendant of his rights, if it appears that the defendant has read the card and indicates an understanding of what he has read").

Accordingly, it is clear from the record -- including the videotape and the defendant's signed *Miranda* waiver form -- that he received and waived his *Miranda* rights before speaking with the officers and that he was not too intoxicated to understand his rights and to waive them intelligently and voluntarily

before both the first and the second interviews. Contrary to the motion judge's thinking (C.A. 9), the police were not required to engage in a colloquy with the defendant regarding the extent of his alcohol consumption, or its effect on his sobriety and thinking, before proceeding. Rather, they were entitled to rely on their observations as to the defendant's appearance and conduct. See *Commonwealth v. Pina*, 430 Mass. 66, 71 (1999). That the defendant reported having consumed alcohol hours prior to the interrogation, and appeared to stumble when entering the room for the second interview (Exh. 4), did not render his understanding and waiver unintelligent or involuntary. *See Commonwealth v. Prater*, 420 Mass. 569 (1995). Indeed, even where, as here, police had detected an odor of alcohol (albeit some time before), the determination that the defendant understood his rights and waived them knowingly and intelligently is warranted where his answers to inquiries are responsive, coherent, and sometimes self-serving. He was not so intoxicated that he was unable to waive his rights in an intelligent, knowing, and voluntary manner. *See Commonwealth v. Newsom*, 471 Mass. 222,

231-232 (2015); *Commonwealth v. Lopes*, 455 Mass. 147, 167 (2009) (defendant was twice given complete *Miranda* warnings; each time he was read each right verbatim from a form, stated that he understood each right, and signed his name to the form, indicating that he understood the rights and waived them voluntarily and wished to make a statement); *Commonwealth v. Murphy*, 442 Mass. 485, 494 (2004) (police officer's scrupulous administration of *Miranda* warnings where officer stopped to ask defendant whether he understood each right and gave him *Miranda* form to sign and read, helped show that defendant's *Miranda* waiver was valid); *Commonwealth v. Raymond*, 424 Mass. 382, 393 (1997) ("once the [*Miranda*] warnings are read, the defendant presumably understands that he need not answer any questions the police pose").

"Because defendant was advised of, and waived, his [*Miranda*] rights, the issue becomes whether the Commonwealth has proved, by a totality of the circumstances, that defendant made a voluntary, knowing, and intelligent waiver of his rights, and that his statements were otherwise voluntary." *Commonwealth v. LeBeau*, 451 Mass. 244, 255 (2008). "A

statement is voluntary if it is the product of a 'rational intellect' and a 'free will,' and not induced by physical or psychological coercion." *Commonwealth v. LeBlanc*, 433 Mass. 549, 554 (2001), citing *Commonwealth v. Mandile*, 397 Mass. 410, 413 (1986). The test for voluntariness is whether

> in light of the totality of the circumstances surrounding the making of the statement, the will of the defendant was overborne to the extent that the statement was not the result of a free and voluntary act. Relevant factors include whether promises or other inducements were made to the defendant by the police, as well as the defendant's age, education, and intelligence; experience with the criminal justice system; and his physical and mental condition, including whether the defendant was under the influence of drugs or alcohol. The mere presence of one or more factors is not always sufficient to render the statements involuntary.

Commonwealth v. Howard, 469 Mass. 721, 727-28 (2014). Although "special care must be taken to assess the voluntariness of a defendant's statement where there is evidence that he was under the influence of alcohol or drugs, an 'otherwise voluntary act is not necessarily rendered involuntary simply because an individual has been drinking or using drugs.'" *Commonwealth v. Brown*, 462 Mass. 620, 627 (2012),

quoting *Commonwealth v. Silanskas*, 433 Mass. 678, 685 (2001).

The motion judge's finding that the defendant was "far too intoxicated" to understand and to make a knowing, voluntary, and intelligent waiver of his rights to remain silent or obtain counsel during both interviews (C.A. 9) is simply contrary to the best evidence of the defendant's condition-- the recording itself (Exh. 4). As this Court is well aware, there is no *per se* rule of exclusion for statements given by individuals who have consumed alcohol. Instead, there are myriad cases affirming the principal that even those who unquestionably display signs of intoxication are able to intelligently waive *Miranda* and voluntarily provide a statement to the police. *See, e.g., Brown*, 462 Mass. at 627 (even though the defendant's speech was "sluggish" from being under the influence of drugs, his statements were voluntary where "there [was] nothing to suggest that he was acting irrationally or was out of control, or that his denials were induced by psychological coercion"); *Commonwealth* v. *Simmons*, 417 Mass. 60, 65-66 (1994) (even where the defendant's speech was slurred due to

intoxication, his statements were voluntary when the police could understand him, when he walked without difficulty, and when he appeared to understand what was happening); *Commonwealth* v. *Liptak*, 80 Mass. App. Ct. 76, 80-82 (2011) (even though the defendant was intoxicated, his statements were voluntary because he was coherent and because he understood and responded to questions asked of him, and because he was alert and spoke in a cogent manner).

In determining whether the level of intoxication prevented the defendant from being able to validly waive his rights, the defendant's outward behavior is key. *Commonwealth v. Garcia*, 379 Mass. 422 (1980); *Silanskas*, 433 Mass. at 678 (while odor of alcohol was apparent on defendant's breath, his answers were responsive, coherent, and he could understand the inquiries posed to him); *Commonwealth v. Mello*, 420 Mass. 375 (1995) (defendant spoke coherently, appeared sober, and did not have any difficulty understanding questions).

Here, while there is some indication that the defendant had been drinking alcohol some hours prior to the interrogation, the motion judge's finding that

his intoxication rendered him unable to make a valid waiver is contradicted by an unbiased assessment of what is seen on the video (Exh. 4). *Howard*, 469 Mass. at 727 (videotape of booking confirmed that, though intoxicated, the defendant's statement was voluntary where he was able to follow commands, answer questions, carry on conversations, and maneuver without assistance). Even accepting that the defendant had been drinking at some point earlier that day, or the night before, and was perhaps to some extent under the influence of alcohol, intoxication alone is not enough to negate voluntariness. *Commonwealth v. Hooks*, 375 Mass. 284 (1978); *Commonwealth v. Meehan*, 377 Mass. 552 (1979) (reaffirming that intoxication does not alone justify the suppression of a statement of admission); *Commonwealth v. Doucette*, 391 Mass. 443 (1984). Indeed, there is no indication in the video that the defendant was confused or had trouble understanding the officers (Exh. 4). There is similarly no evidence that his answers were inappropriate or garbled, or that his will was being overborne (Exh. 4). The defendant did not assert at any point that he was

intoxicated, and he did not slur his words during the interaction (Exh. 4). The defendant appropriately responded to the officers questions, knew when to withhold information (i.e., when asked to provide Doucette's last name, the defendant declined for fear of getting Doucette in trouble), and knew to withhold certain details of the assault on the victim (i.e., the defendant only admitted to using an open hand to hit the victim) (Exh. 4), was able to recall a telephone number (Exh. 4), was able to relay specific details of what had occurred over the course of the days leading up to the victim's death (Exh. 4), and even corrected the detectives when they made mistakes repeating what he had said (Exh. 4). Moreover, the defendant's strategic withholding of information conveyed an awareness of his self-interest: for example, when asked to provide Doucette's last name, the defendant declined for fear of getting Doucette in trouble, and the defendant tactically withheld certain details of the assault on the victim, admitting, for example, only to using an open hand to hit the victim (Exh. 4). Additionally, even during the first interview, the defendant was able to tell police

exactly where the victim's dentures and phone were located in the apartment (Tr. 94-95, 117, 122). The defendant's behavior and recall is simply not that of a man who was too intoxicated to appreciate the rights he is afforded. He followed commands, answered questions, and carried on conversations, and promoted his own agenda. *See Howard*, 469 Mass. at 728. That the motion judge concluded otherwise does not change what actually occurred or establish what is plainly evident from review of the video, the defendant understood his *Miranda* rights, and made the conscious and rational decision to knowingly, voluntarily, and intelligently forego them.

Commonwealth v. McCray, 457 Mass. 544, 553-55 (2010), is instructive. There, the defendant along with several others tied up, beat, burned, stabbed, and murdered a 19 year old girl. *Id.* at 547. The defendant moved to suppress statements and asserted that he was intoxicated, possibly retarded, or suffered from some mental illness, which rendered his statements to police inadmissible. *Id.* at 549. Citing established precedent, the Supreme Judicial Court reiterated that, while mental retardation or

mental illness are relevant, they do not preclude the making of voluntary statements or waivers. *Id.* at 554. Evidence of impairments such as these, as well as intoxication, only requires suppression where the defendant is rendered incapable of giving a voluntary statement or waiver. *Id.*

As is evident from the interrogation video and from the testimony concerning the first interview, here the defendant and the officers spoke to each other in a casual manner, the defendant was clear in his statements and responses, he clarified items and even corrected the officers (Tr. 90-98, Exh. 4). There was no evidence whatsoever that the defendant's will was overborne due to supposed intoxication (Exh. 4). The defendant requested the opportunity to have a cigarette, and he was allowed to smoke (C.A. 5-6). He asked for water and received it (Exh. 4). He knew to ask whether he was going to be released (C.A. 6-7). He had the presence of mind to know the difference between a "straight warrant" and a default warrant (Exh. 3). Viewing the video, and taking into account the uncontroverted testimony concerning the first interview, it strains credulity to suggest that, under

these circumstances, the defendant was so intoxicated as to render his *Miranda* waiver unintelligent and involuntary and his statements themselves involuntary, or that Sergeant Detective Stratton knew or should have known that the defendant was too intoxicated to validly waive his rights (C.A. 9). *See Commonwealth v. Dunn*, 407 Mass. 798, 803-805 (1990) (police officers may rely on defendant's outward appearance of sobriety when deciding whether to proceed with interrogation). *Contrast Silanskas*, 433 Mass. at 682-83, 685-86 (although officer "detected an odor of alcohol on defendant's breath and he noted that defendant was under the influence of alcohol," waiver was valid where "defendant's answers to the inquires made of him were responsive, coherent, and "'quite self-serving'"). Thus, this Court should reverse the motion judge's order allowing the defendant's motion to suppress statements based upon its determination that the defendant intelligently and voluntarily waived his *Miranda* rights before speaking with the homicide detectives and thus made both statements voluntarily.

II. THE MOTION JUDGE FURTHER ERRED IN SUPPRESSING THE RESULTS OF FORENSIC TESTING REVEALING THE VICTIM'S DNA PROFILE ON THE DEFENDANT'S LAWFULLY SEIZED CLOTHING.

Judge Salinger also erred in allowing the defendant's motion to suppress the results of the forensic testing on the defendant's lawfully seized clothes (C.A. 10). Judge Salinger found that the police properly seized the defendant's clothing under the exigency exception to the search warrant requirement because they could see blood stains on it, but then inexplicably suppressed the forensic testing because the police did not obtain a search warrant before proceeding with such testing (C.A. 10-11).

As a preliminary matter, the police had probable cause to seize the defendant's clothing. "Probable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Commonwealth v. Hason*, 387 Mass. 169, 174 (1982), quoting *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949). Here, the officers had probable

cause to believe that the defendant had committed the crimes of murder and violation of a restraining order, and were permitted to seize his clothing.

Here, there is no question that the defendant was arrested pursuant to a valid warrant for failing to register as a sex offender (C.A. 4). There is also no question that the police had probable cause to arrest the defendant for violating a restraining order (C.A. 2, 3). Indeed, if the victim's blood was on the defendant's clothing, it would substantiate the violation of a restraining order charge by proving that the defendant was close enough to the victim to have her blood on him, and was in danger of destruction or concealment. G.L. c. 276, § 1. In addition, the police had probable cause, even absent the defendant's statements during the interviews, to believe that he had murdered the victim. The defendant was present at the scene of a homicide, the victim of which was found lying on a "very bloody couch" and had a "bruised and bloody" face (C.A. 3-4). The defendant had plainly visible blood on his clothing (C.A. 11). The police knew that the victim of the homicide had an active restraining order

against the defendant (C.A. 2). The defendant stated to police (prior to any custodial interrogation) that he knew what had happened and was a known suspect in a number of incidents of domestic violence involving the victim (C.A. 3-4). *Commonwealth v. Robles*, 423 Mass. 62, 67-68 (1996)(police could seize defendant's jacket at the time of the defendant's arrest because there was probable cause to believe that he was wearing it the night of the murder); *Commonwealth v. Gliniewicz*, 398 Mass. 744, 749-750 (1986) (police could seize defendant's boots after the conclusion of interview where the boot tread was similar to one observed on scene and there appeared to be blood on them). Accordingly, police had ample probable cause to arrest the defendant for murder and for violating a restraining order, and the clothes were properly seized.[10]

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[10] The Commonwealth disagrees with the motion judge's characterization that it "presented no evidence and made no argument that the police still had probable cause to arrest Tremblay for murder without considering his confession during the two custodial interrogations" (C.A. 10). Indeed, the entirety of the testimony presented at the hearing establishes that the police had probable cause to believe that the defendant had committed the murder.

As noted above, at the time that the defendant's clothing was seized, and as the judge found, the defendant was arrested and police had observed blood on the defendant's socks and sneakers (Tr. 118, C.A. 8, 11, 42-43, 46). *See Commonwealth v. Cefalo*, 381 Mass. 319, 330 (1980) (police properly seized blood-stained clothing under plain view doctrine where they reasonably believed perpetrator may have been spattered with blood when he shot victim). Police are also permitted to seize evidence of a crime, including the defendant's clothing, at the time of his arrest. *Commonwealth v. Madera*, 402 Mass. 156, 159 (1988); *Commonwealth v. Dessources*, 74 Mass. App. Ct. 232, 234-237 (2009); *Commonwealth v. Robles*, 423 Mass. 62, 67-68 (1996). "A search conducted incident to an arrest may be made only for the purposes of seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made, in order to prevent its destruction or concealment[.]" G.L. c. 276, § 1. Where the police had probable cause to believe that the defendant had committed the crimes of violation of a restraining order and murder, and could see blood on his clothing

in plain view, they were warranted in seizing the clothes.

While the motion judge found that the clothes were properly seized (C.A. 10), his ruling that they must be suppressed because of the lack of a search warrant prior to forensic testing wholly ignores the Supreme Judicial Court's decision in *Commonwealth v. Arzola*, 470 Mass. 809, 814-820 (2015), which holds that a warrant is not needed in order to conduct DNA testing on lawfully seized evidence. More specifically, the Court found that:

> [a] defendant generally has a reasonable expectation of privacy in the shirt he or she is wearing, but where, as here, the shirt is lawfully seized, a defendant has no reasonable expectation of privacy that would prevent the analysis of that shirt to determine whether blood found on it belonged to the victim or to the defendant.

Id. at 817. The Court concluded that:

> where, as here, DNA analysis is limited to the creation of a DNA profile from lawfully seized evidence of a crime, and where the profile is used only to identify its unknown source, the DNA analysis is not a search in the constitutional sense. Therefore, no search warrant was required to conduct the DNA analysis of the bloodstain from the defendant's clothing that revealed that the victim was the source of the blood.

Id. at 820.

The *Arzola* decision is in line with well-settled jurisprudence that the police do not need to secure a search warrant to conduct forensic testing of lawfully seized evidence. Indeed, "the Supreme Judicial Court has concluded that where the police have lawfully obtained evidence, it may be subjected to scientific testing." *Commonwealth v. Aviles*, 58 Mass. App. Ct. 459, 463 (2003) (defendant's motion to suppress warrantless DNA testing results of clothing that revealed defendant's sperm and DNA properly denied), citing *Commonwealth v. Varney*, 391 Mass. 34, 41 (1984)(search warrant not required to test powder to determine if it is cocaine). *See also Robles*, 423 Mass. at 65 n.8. In *Robles*, the defendant was convicted of first degree murder, armed robbery, and unlawful possession of a firearm. The police recovered the coat the defendant had worn the night of the murder, and had it forensically tested for blood, without a warrant. In unequivocal language, the Supreme Judicial Court stated that the defendant's argument that a warrant was necessary for chemical analysis of the coat was "without merit". *Id.* *See also Varney*, 391 Mass. at 38-39 (court explicitly

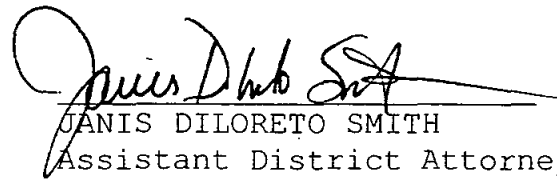
refused to hold that police must obtain a warrant before lawfully obtained evidence can be subject to scientific testing). Here, where the defendant's clothing was lawfully seized, no search warrant was required and the motion judge's suppression of the results of the forensic testing must be reversed.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court reverse the motion judge's partial allowance of the motion to suppress, affirm the partial denial of the motion to suppress, and remand the case to the trial court for further proceedings.

Respectfully submitted
FOR THE COMMONWEALTH,

DANIEL F. CONLEY
District Attorney
for the Suffolk District



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ADDENDUM

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article Twelve of the Massachusetts Declaration of Rights

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his council at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

G.L. c. 209A, § 7. Abuse prevention orders; domestic violence record search; service of order; enforcement; violations

When considering a complaint filed under this chapter, a judge shall cause a search to be made of the records contained within the statewide domestic violence record keeping system maintained by the office of the commissioner of probation and shall review the resulting data to determine whether the named defendant has a civil or criminal record involving domestic or other violence. Upon receipt of information that an outstanding warrant exists against the named defendant, a judge shall order that the appropriate law enforcement officials be notified and shall order that any information regarding the defendant's most recent whereabouts shall be forwarded to such officials. In all instances where an outstanding warrant exists, a judge shall make a finding, based upon all of the circumstances, as to whether an imminent threat of bodily injury exists to the petitioner. In all instances where such an imminent threat of bodily injury is found to exist, the judge shall notify the appropriate law enforcement officials of such finding and such officials shall take all necessary actions to execute any such outstanding warrant as soon as is practicable.

Whenever the court orders under sections eighteen, thirty-four B, and thirty-four C of chapter two hundred and eight, section thirty-two of chapter two hundred and nine, sections three, four and five of this chapter, or sections fifteen and twenty of chapter two hundred and nine C, the defendant to vacate, refrain from abusing the plaintiff or to have no contact with the plaintiff or the plaintiff's minor child, the register or clerk-magistrate shall transmit two certified copies of each such order and one copy of the complaint and summons forthwith to the appropriate law enforcement agency which, unless otherwise ordered by the court, shall serve one copy of each order upon the defendant, together with a copy of the complaint, order and summons and notice of any suspension or surrender ordered pursuant to section three B of this chapter. Law enforcement agencies

shall establish adequate procedures to ensure that, when effecting service upon a defendant pursuant to this paragraph, a law enforcement officer shall, to the extent practicable: (i) fully inform the defendant of the contents of the order and the available penalties for any violation of an order or terms thereof and (ii) provide the defendant with informational resources, including, but not limited to, a list of certified batterer intervention programs, substance abuse counseling, alcohol abuse counseling and financial counseling programs located within or near the court's jurisdiction. The law enforcement agency shall promptly make its return of service to the court.

Law enforcement officers shall use every reasonable means to enforce such abuse prevention orders. Law enforcement agencies shall establish procedures adequate to insure that an officer on the scene of an alleged violation of such order may be informed of the existence and terms of such order. The court shall notify the appropriate law enforcement agency in writing whenever any such order is vacated and shall direct the agency to destroy all record of such vacated order and such agency shall comply with that directive.

Each abuse prevention order issued shall contain the following statement: VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE.

Any violation of such order or a protection order issued by another jurisdiction shall be punishable by a fine of not more than five thousand dollars, or by imprisonment for not more than two and one-half years in a house of correction, or by both such fine and imprisonment. In addition to, but not in lieu of, the forgoing penalties and any other sentence, fee or assessment, including the victim witness assessment in section 8 of chapter 258B, the court shall order persons convicted of a crime under this statute to pay a fine of $25 that shall be transmitted to the treasurer for deposit into the General Fund. For any violation of such order, or as a condition of a continuance without a finding, the court shall order

the defendant to complete a certified batterer's intervention program unless, upon good cause shown, the court issues specific written findings describing the reasons that batterer's intervention should not be ordered or unless the batterer's intervention program determines that the defendant is not suitable for intervention. The court shall not order substance abuse or anger management treatment or any other form of treatment as a substitute for certified batterer's intervention. If a defendant ordered to undergo treatment has received a suspended sentence, the original sentence shall be reimposed if the defendant fails to participate in said program as required by the terms of his probation. If the court determines that the violation was in retaliation for the defendant being reported by the plaintiff to the department of revenue for failure to pay child support payments or for the establishment of paternity, the defendant shall be punished by a fine of not less than one thousand dollars and not more than ten thousand dollars and by imprisonment for not less than sixty days; provided, however, that the sentence shall not be suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until he shall have served sixty days of such sentence.

When a defendant has been ordered to participate in a treatment program pursuant to this section, the defendant shall be required to regularly attend a certified or provisionally certified batterer's treatment program. To the extent permitted by professional requirements of confidentiality, said program shall communicate with local battered women's programs for the purpose of protecting the victim's safety. Additionally, it shall specify the defendant's attendance requirements and keep the probation department informed of whether the defendant is in compliance.

In addition to, but not in lieu of, such orders for treatment, if the defendant has a substance abuse problem, the court may order appropriate treatment for such problem. All ordered treatment shall last until the end of the probationary period or until the

treatment program decides to discharge the defendant, whichever comes first. When the defendant is not in compliance with the terms of probation, the court shall hold a revocation of probation hearing. To the extent possible, the defendant shall be responsible for paying all costs for court ordered treatment.

Where a defendant has been found in violation of an abuse prevention order under this chapter or a protection order issued by another jurisdiction, the court may, in addition to the penalties provided for in this section after conviction, as an alternative to incarceration and, as a condition of probation, prohibit contact with the victim through the establishment of court defined geographic exclusion zones including, but not limited to, the areas in and around the complainant's residence, place of employment, and the complainant's child's school, and order that the defendant to wear a global positioning satellite tracking device designed to transmit and record the defendant's location data. If the defendant enters a court defined exclusion zone, the defendant's location data shall be immediately transmitted to the complainant, and to the police, through an appropriate means including, but not limited to, the telephone, an electronic beeper or a paging device. The global positioning satellite device and its tracking shall be administered by the department of probation. If a court finds that the defendant has entered a geographic exclusion zone, it shall revoke his probation and the defendant shall be fined, imprisoned or both as provided in this section. Based on the defendant's ability to pay, the court may also order him to pay the monthly costs or portion thereof for monitoring through the global positioning satellite tracking system.

In each instance where there is a violation of an abuse prevention order or a protection order issued by another jurisdiction, the court may order the defendant to pay the plaintiff for all damages including, but not limited to, cost for shelter or emergency housing, loss of earnings or support, out-of-pocket losses for injuries sustained or property damaged, medical expenses, moving expenses, cost for

obtaining an unlisted telephone number, and reasonable attorney's fees.

Any such violation may be enforced in the superior, the district or Boston municipal court departments. Criminal remedies provided herein are not exclusive and do not preclude any other available civil or criminal remedies. The superior, probate and family, district and Boston municipal court departments may each enforce by civil contempt procedure a violation of its own court order.

The provisions of section eight of chapter one hundred and thirty-six shall not apply to any order, complaint or summons issued pursuant to this section.

G.L. c. 265, § 1. Murder defined

Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.

G.L. c. 276, § 1. Complaint for issuance of search warrant; warrant for designated property or articles; search incident to arrest; documentary evidence subject to privilege

A court or justice authorized to issue warrants in criminal cases may, upon complaint on oath that the complainant believes that any of the property or articles hereinafter named are concealed in a house, place, vessel or vehicle or in the possession of a person anywhere within the commonwealth and territorial waters thereof, if satisfied that there is probable cause for such belief, issue a warrant identifying the property and naming or describing the person or place to be searched and commanding the person seeking such warrant to search for the following property or articles:

First, property or articles stolen, embezzled or obtained by false pretenses, or otherwise obtained in the commission of a crime;

Second, property or articles which are intended for use, or which are or have been used, as a means or instrumentality of committing a crime, including, but not in limitation of the foregoing, any property or article worn, carried or otherwise used, changed or marked in the preparation for or perpetration of or concealment of a crime;

Third, property or articles the possession or control of which is unlawful, or which are possessed or controlled for an unlawful purpose; except property subject to search and seizure under sections forty-two through fifty-six, inclusive, of chapter one hundred and thirty-eight;

Fourth, the dead body of a human being.

Fifth, the body of a living person for whom a current arrest warrant is outstanding.

A search conducted incident to an arrest may be made only for the purposes of seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made, in order to prevent its destruction or concealment; and removing any weapons that the arrestee might use to resist arrest or effect his escape. Property seized as a result of a search in violation of the provisions of this paragraph shall not be admissible in evidence in criminal proceedings.

The word ''property'', as used in this section shall include books, papers, documents, records and any other tangible objects.

Nothing in this section shall be construed to abrogate, impair or limit powers of search and seizure

granted under other provisions of the General Laws or under the common law.

Notwithstanding the foregoing provisions of this section, no search and seizure without a warrant shall be conducted, and no search warrant shall issue for any documentary evidence in the possession of a lawyer, psychotherapist, or a clergyman, including an accredited Christian Science practitioner, who is known or may reasonably be assumed to have a relationship with any other person which relationship is the subject of a testimonial privilege, unless, in addition to the other requirements of this section, a justice is satisfied that there is probable cause to believe that the documentary evidence will be destroyed, secreted, or lost in the event a search warrant does not issue. Nothing in this paragraph shall impair or affect the ability, pursuant to otherwise applicable law, to search or seize without a warrant or to issue a warrant for the search or seizure of any documentary evidence where there is probable cause to believe that the lawyer, psychotherapist, or clergyman in possession of such documentary evidence has committed, is committing, or is about to commit a crime. For purposes of this paragraph, ''documentary evidence'' includes, but is not limited to, writings, documents, blueprints, drawings, photographs, computer printouts, microfilms, X-rays, files, diagrams, ledgers, books, tapes, audio and video recordings, films or papers of any type or description.

COMMONWEALTH'S APPENDIX

28

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT.
1584CR10151

COMMONWEALTH

v.

RANDALL TREMBLAY

FINDINGS OF FACT, RULINGS OF LAW, AND ORDER ALLOWING DEFENDANT'S MOTION TO SUPPRESS CERTAIN EVIDENCE

Randall Tremblay has been indicted for murdering Stephanie McMahon, based in part on statements he made to the police during successive custodial interrogations and on blood found on Tremblay's clothing, which the police seized when they arrested him for murder after completing the interrogations. Tremblay moves to suppress all statements he made to the police and all evidence seized from him, including the clothing he was wearing at the time he was seized and arrested. The Court finds that Tremblay was intoxicated when he was questioned by the police and that the Commonwealth has not met its burden of proving that Tremblay made a knowing and intelligent waiver of his *Miranda* rights to remain silent and to consult with a lawyer. It concludes that the police lawfully seized Tremblay's clothing in order to preserve evidence of an apparent homicide, but that under the circumstances of this case the police acted unlawfully by subjecting that clothing to forensic testing without first obtaining a search warrant. The Court will therefore allow Tremblay's motion to suppress in part, to the extent that he seeks to suppress all statements he made after being transported to police headquarters and to suppress all forensic testing of his clothing.

1. Findings of Fact. The Court heard testimony from Boston Police Sgt. Scott Yanovitch, Ofc. Shawn Roberts, and Sgt. Det. Michael Stratton during an evidentiary hearing held on November 30, 2015. The Court credits their testimony to the extent it is consistent with the explicit findings of fact made below. In addition, the Court received into evidence a number of exhibits. The Court makes

the following findings of fact based on this evidence and on reasonable inferences it has drawn from this evidence.

1.1. Initial Response to Crime Scene. Shortly after 2:00 a.m. on Tuesday, November 18, 2014, the Boston police received a 911 call reporting that a woman had died at a home in the Hyde Park section of Boston. Ofc. Landrom and two Emergency Medical Services ("EMS") personnel responded to the scene first. They found the victim, Stephanie McMahon, lying dead on a very bloody couch with a blanket over her. McMahon's face was bruised and bloodied. Michael Doucette and Gay Finley were in the apartment. Ms. Finley had called 911.

Sgt. Yanovitch arrived just after EMS had pronounced McMahon to be dead. Yanovitch asked the police dispatcher to issue "full notifications," which means that the police have found a dead person and that all relevant units, including a homicide detective, should respond to the scene. Yanovitch spoke separately with Doucette (who smelled of alcohol and acted intoxicated) and Finley (who did not). The full notifications went out around 2:50 a.m. Sgt. Det. Michael Stratton of the homicide unit was notified about the matter by page. He drove from his home in Hopkinton to the crime scene.

Ofc. Roberts and Ofc. Laden were on patrol together that night in a marked police cruiser. Roberts recognized the Hyde Park address because he had been there a couple of months earlier when McMahon reported that her window had been damaged. He know from that prior call that Ms. McMahon had called the police on several occasions regarding alleged domestic violence against her by Randall Tremblay. As a result, when Roberts heard by radio the issuance of "full notifications" for McMahon's address, he used his mobile data terminal to look up previous police reports regarding that address. That led him to check Tremblay's online criminal record. Roberts learned that there was an active restraining order requiring Tremblay to stay away from McMahon's residence, as well as an active arrest warrant against Tremblay for failing to register with the sex offender registration board. Roberts was able to pull up and view one or more booking photos of Tremblay, so he now knew what Tremblay looked like.

1.2. Tremblay's Behavior at the Crime Scene. Over the next hour or so Sgt. Yanovitch observed a man who turned out to be Mr. Tremblay hanging out near Ms. McMahon's apartment. The first time, Yanovitch had stepped outside the apartment to get some fresh air when he noticed Tremblay walk past. Tremblay was talking and mumbling to himself.

The second time, Doucette asked if he could go outside to smoke a cigarette. Yanovitch went with him. Tremblay again walked by, still talking to himself. Tremblay asked Doucette for a cigarette. Yanovitch told Tremblay to move along. At around this time, Roberts completed his online research of McMahon and Tremblay, and contacted Yanovitch by radio to report what he had learned. Roberts explained the apparent history between McMahon and Tremblay, and informed Yanovitch about the restraining order and arrest warrant that had been issued against Tremblay. Sgt. Yanovitch asked Ofc. Roberts to come to the Hyde Park address, take a look at Doucette, and determine whether he looked like Tremblay. Roberts arrived at the scene a few minutes later. He told Yanovitch that Doucette was not Tremblay, and did not appear to have been involved in any of the prior domestic violence incidents against McMahon. Roberts then left the scene. Yanovitch and Doucette went back inside the apartment.

The third time, Yanovitch was inside the apartment when he heard someone yelling loudly outside. Yanovitch went out and discovered that Tremblay was doing the yelling. Tremblay was on the sidewalk yelling things like "What's going on in there?", "I know what happened," and "She was my friend." Tremblay then walked up to Yanovitch and again asked "what's going on in there?" and again said "she was my friend." Yanovitch asked Tremblay "What's your name?" Tremblay did not answer, but instead said "What, are you going to run me?" Yanovitch then radioed Roberts and asked him to come back to the scene to determine whether this second man was Tremblay. By now it was around 3:40 a.m.

When Ofc. Roberts and Ofc. Laden returned to McMahon's apartment, Mr. Tremblay was still with Sgt. Yanovitch. Roberts recognized Tremblay from his

booking photo. Roberts told Yanovitch that the man who had been yelling was Tremblay, and that there was an outstanding arrest warrant against him.

Roberts and Laden approached Tremblay. Roberts could smell alcohol on Tremblay. Roberts told Tremblay that he had an outstanding arrest warrant, and that he was therefore under arrest. He and Laden placed Tremblay in handcuffs. Tremblay said he had paperwork in his pocket showing that the arrest warrant had been recalled. Roberts looked at the paperwork and saw that it concerned a different warrant. But he nonetheless took Tremblay's ID, went back online using the mobile data terminal in his cruiser, and confirmed that there was an active warrant for Tremblay's arrest. Roberts then read Tremblay his *Miranda* rights from a laminated card. Tremblay never said whether he understood those rights or not.

Roberts and Laden drove Tremblay to Boston Police headquarters in their marked police cruiser. Tremblay was in the rear seat and was handcuffed during this ride. During the drive, Tremblay kept asking if he was going to be released, because the arrest warrant was a mistake. Tremblay said nothing about McMahon's death during this ride. Upon arrival, the officers brought Tremblay to the homicide unit on the second floor.

The police also transported Doucette and Finley to police headquarters to be interviewed by a homicide detective. The detectives interrogated Tremblay before speaking with Doucette or Finley. The Commonwealth presented no evidence regarding what, if anything, the police learned from Doucette or Finley either at the crime scene, later at police headquarters, or at any other time.

1.3. **First Interrogation of Tremblay**. Sgt. Det. Michael Stratton interviewed Mr. Tremblay in an interview room for about an hour, beginning at around 4:30 a.m. (The Court credits the date and time stamp on the recording of the wrong room, and does not credit the inconsistent time that someone wrote on the *Miranda* form discussed below). Stratton believed that the interview was being recorded. Unfortunately, whomever turned on the recording equipment did so for the wrong interview room. The room where Gay Finley was sleeping was recorded for that hour. Stratton's interview of Tremblay was not. Stratton took no notes,

because he thought the interview was being recorded. Although no other police officer was present in the interview room with Stratton and Tremblay, Ofc. Roberts observed and listened to the interview on the recording system's monitor outside the interview room.

At the beginning of this first interview, Sgt. Det. Stratton told Tremblay that the interview was being recorded. He then read Mr. Tremblay his *Miranda* rights from a preprinted form. Tremblay put his initials next in each spot that Stratton told him to initial, and signed his name where Stratton told him to sign. Over the next hour, Tremblay made statements implicating himself in McMahon's death. Tremblay said that he had been with McMahon Sunday night, that they got into an argument, that he used his hands to strike McMahon in the head twelve to fifteen times, that Tremblay "got her good," and that "I think I killed her." Tremblay told Stratton that when he woke up Monday morning McMahon's body was cold and he believed she was dead, that Tremblay then left the apartment and found Mr. Doucette, that they drank some beer together, and that Tremblay, Doucette, and Doucette's friend returned to McMahon's apartment. Tremblay said he mopped up some big puddles of blood in the apartment and took out some trash. Tremblay also said that he drank some more beer in the apartment, finishing the last one just before Finley called 911. The Court credits Ofc. Roberts testimony that during the whole time that Tremblay was confessing he had killed McMahon, he still kept saying that the warrant for his arrest for failing to register as a sex offender was a mistake, and he still kept asking when he was going to be release.

For the reasons explained below, the Court finds that Tremblay was intoxicated throughout this first interrogation.

1.4. Cigarette Break. After Stratton completed the interview and left the interview room, he learned that the wrong room was recorded. Stratton was upset. He went back to Tremblay, explained that the interview had accidently not been recorded after all, and asked Tremblay if he would agree to a second interview, to go over the same things that Tremblay had already explained to Stratton, but

this time to have it all be recorded. Tremblay said that he wanted to have a cigarette first.

Ofc. Roberts and Ofc. Laden then brought Mr. Tremblay to a fire exit door so that he could smoke a cigarette. They handcuffed Tremblay's wrists together in front of his body.

During this ten minute break, Tremblay kept asking when he was going to get out. Tremblay did not understand that he had just incriminated himself by confessing he had killed McMahon, that his statements were going to be used against him, and that therefore the police were not going to let him go but instead were going to hold him and charge him with killing McMahon.

1.5. Second Interrogation of Tremblay. Stratton interviewed Tremblay a second time, beginning around 5:50 a.m. The second interview was recorded. Having viewed and listened to the entire recording several times, the Court finds that Tremblay was quite intoxicated throughout that interview and that he did not knowingly and intelligently waive his *Miranda* rights.

Sgt. Det. Stratton never asked Mr. Tremblay if he had been drinking alcohol, had taken any kind of legal or illegal drugs, or was unable to focus or understand what was happening for some other reason. The Court finds that Stratton knew that Tremblay had been drinking, that he should have known that Tremblay was acting like he was drunk or similarly incapacitated, and that Stratton therefore should have asked Tremblay questions to determine whether Tremblay was intoxicated and whether he had the capacity to understand what he was doing in waiving his *Miranda* rights. The Court finds that Stratton never did so.

When Tremblay was brought back to the interview room, he walked past Michael Doucette, who was eating somewhere nearby. Tremblay tried to get food from Doucette. At one point Tremblay said to Doucette, "Mike, give me an English muffin, will you?"

Tremblay was stumbling around and very unsteady on his feet when he was brought back into the interview for the second interrogation. In the recording of this interview Tremblay sounds drunk and seems to have trouble speaking clearly, as

Sgt. Det. Stratton is taking off his handcuffs. Once his cuffs are off, Tremblay had great difficulty walking just a few steps to his seat. He stumbles several times before managing to sit down.

Tremblay asked "Am I out of here or not?" Stratton replied "Pretty soon." Tremblay then asked "Straight up?" It is apparent that Stratton still did not understand that having incriminated himself by confessing that he beat McMahon to death he was not going to be released.

Once Tremblay was seated, he paid very little attention while Stratton tried to review the *Miranda* form with him. At some point Tremblay reached across the table and started playing with Stratton's pen and the papers he had in front of him. Stratton did not ask Tremblay to sign a new *Miranda* form, but instead shows Tremblay the one he previously signed. Stratton finally gets Tremblay to say that he understood all of his *Miranda* rights. The Court finds, however, that Tremblay was not focused at this point and was paying very little attention to the rights that Stratton read to him from the *Miranda* form.

During the second interview, Tremblay once again admits that he repeatedly hit McMahon in the head, and in so doing he killed McMahon. At one point Tremblay said "She's dead because of me." At another he said "I did whack her." Stratton has Tremblay explain in some detail exactly what Tremblay recalled happening the night he killed McMahon, and what Tremblay did after waking up the next morning and finding that McMahon was dead.

Although Tremblay again admitted that he had killed McMahon, during the second interview Tremblay kept asking when Stratton is going to let him go. Toward the end of the second interview Tremblay said "You're gonna let me go now, right?" and "Let me walk out of here." After the interview was completed, and Stratton was guiding Tremblay out of the interview room, Tremblay kept asking when Stratton was going to let him go.

The Court finds that at the end of the second interview Tremblay still did not understand that he had incriminated himself, and that police were going to use

Tremblay's statements against him, and that the police were going to arrest Tremblay for killing McMahon and thus would not be letting him go.

Since it is apparent that Tremblay was quite intoxicated throughout the second police interrogation, the Court infers and therefore finds that he was even more drunk during the first interview.

1.6. Arrest of Tremblay for Murder and Seizure of his Clothing. Based on Tremblay's statements, Sgt. Det. Stratton arrested Mr. Tremblay for murder. The police brought Tremblay downstairs for full photographs, not just the standard booking photos. Stratton saw that one of Tremblay's sneakers and one of his socks appeared to have blood on them. Based on Tremblay's admissions during the two interviews, Stratton seized all the clothing that Tremblay was wearing at that time. The police performed various forensic tests on that clothing, and determined that every article of clothing Tremblay had been wearing tested positive for the presence of human blood. The police never sought or obtained any search warrant before testing Tremblay's clothing.

2. Rulings of Law.

2.1. Statements Made by Tremblay. The Commonwealth has not met its burden of proving that Mr. Tremblay made a knowing and intelligent waiver of his *Miranda* rights at any time. The Court must therefore suppress all statements made by Tremblay after he was placed in a police cruiser and transported to police headquarters.

Mr. Tremblay was in police custody when he was interrogated by Sgt. Det. Stratton. No one in Tremblay's position would have felt they were free to leave the police headquarters, after being told they were under arrest, handcuffed, and transported to the police headquarters in the back of a marked police cruiser.

Since Tremblay was in custody when he responded to police questioning, any statements made by Tremblay after his arrest are only admissible if the Commonwealth could show that Tremblay knowingly, voluntarily, and intelligently waived his right to remain silent. "The Commonwealth bears the burden of establishing that a defendant's right to remain silent was " 'voluntarily, knowingly

and intelligently' waived." *Commonwealth* v. *Leahy*, 445 Mass. 481, 484-85 (2005), quoting *Commonwealth* v. *Hooks*, 375 Mass. 284, 288 (1978), and *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966). This is a "heavy burden:" the Commonwealth must "prov[e] beyond a reasonable doubt a knowing, intelligent, and voluntary waiver of Miranda rights." *Commonwealth* v. *Murphy*, 442 Mass. 485, 492 (2004).[1] Under art. 12 of the Massachusetts Declaration of Rights, unlike under the Fourth Amendment, police may not "continue questioning a person in custody who has never waived his right to remain silent until such time as that person articulates with utmost clarity his desire to remain silent;" a suspect's uncoerced statement while in police custody does not automatically establish any implied waiver of the right to remain silent. *Commonwealth* v. *Clarke*, 461 Mass. 336, 351 & n.12 (2012) (declining to adopt more relaxed standard for *Miranda* waivers established in *Berghuis* v. *Thompkins*, 130 S.Ct. 2250 (2010)).

The Court finds that Tremblay was far too intoxicated to be able to make a knowing and intelligent waiver of his right to remain silent, and that this was true during the first, unrecorded interview as well as during the second, recorded interrogation. "Special care must be taken to ensure that a defendant has not unknowingly relinquished his constitutional rights while under the influence of drugs or alcohol." *Commonwealth* v. *Hooks*, 375 Mass. 284, 289 (1978). In this case Sgt. Det. Stratton knew or should have known that Tremblay seemed to be quite intoxicated. At that point "all questioning should have ceased until" Tremblay "was clearly capable of responding intelligently." *Commonwealth* v. *Hosey*, 368 Mass. 571, 579 (1975). The Court finds that the Commonwealth has not met its burden of proving that he knowingly and intelligently waived his right to remain silent and his right to speak with an attorney before answering questions by the police. Any

[1] The Commonwealth has tried to evade this burden by asserting that Mr. Tremblay's affidavit in support of his motion to suppress was not sufficient to meet the requirements of Mass. R. Civ. P. 13, and that the memorandum of law filed by Mr. Tremblay's counsel was also somehow "insufficient." These arguments are without merit.

statements made by Tremblay on the day of his arrest must therefore be suppressed. *Id.*

Under the circumstances of this case, the inadvertent failure to record the first interview of Tremblay at police headquarters leaves substantial doubt as to whether Tremblay made a knowing and intelligent waiver of his *Miranda* rights during that first interview. Cf. *Commonwealth* v. *DiGiambattista*, 442 Mass. 423, 441 (2004). Once Tremblay confessed to killing McMahon, in a custodial interrogation that was conducted in violation of *Miranda* and its progeny, the police could not cure that problem by immediately conducting a second interrogation that began with yet another attempt to get Tremblay to waive his *Miranda* rights, this time in a recorded interview. See, e.g., *Commonwealth* v. *Osachuk*, 418 Mass. 229, 234-237 (1994) (applying the so-called "cat out of the bag" doctrine); *Commonwealth* v. *Smith*, 412 Mass. 823, 832-837 (1992) (same).

2.2. **Tremblay's Clothing**. The police acted lawfully in seizing Mr. Tremblay's clothing without a warrant, but they were required to seek and obtain a search warrant before doing any kind of forensic testing on it. Since the police never sought such a warrant, the Court must suppress the results of all testing done on Tremblay's clothing.

The Commonwealth correctly notes that no search warrant would have been required if the police had probable cause to arrest Mr. Tremblay for killing Ms. McMahon. Under those circumstances the could have seized and tested Tremblay's clothing as a search incident to arrest, without having to obtain any search warrant. See *Commonwealth* v. *Robles*, 423 Mass. 62, 65 n.8 & 67-68 (1996).

But the police only had probable cause to arrest Tremblay for murder based on statements obtained from him illegally, as discussed above. The Commonwealth presented no evidence and made no argument that the police still had probable cause to arrest Tremblay for murder without considering his confession during the two custodial interrogations.

It is true that the police had independent grounds for arresting Tremblay, under the warrant authorizing his arrest for failure to register as a sex offender.

But the police could not seize and search Tremblay's clothing incident to his arrest on the open warrant, because there was no reason to believe that his clothing would yield any evidence relevant to that charge. "A search conducted incident to an arrest may be made only for the purposes of seizing ... evidence of the crime for which the arrest has been made" or "removing any weapons that the arrestee might use to resist arrest or effect his escape." G.L. c. 276, § 1.

The police were nonetheless entitled to seize Tremblay's clothing under the so-called "exigency" exception to the constitutional requirement for a search warrant, but could not conduct forensic testing on it without a warrant. See *Commonwealth* v. *Kaupp*, 453 Mass. 102, 106-107 n.7 (2009). Since the police could see blood stains on Tremblay's clothing, they were entitled to seize the clothing as potential evidence without a warrant in order to prevent its destruction. Once the police secured Tremblay's clothing, however, they were required "to seek a search warrant to conduct a forensic analysis" of the clothing. *Id.*

ORDER

Defendant's motion to suppress evidence is ALLOWED IN PART and DENIED IN PART. The motion is allowed with respect to the custodial interrogations of Defendant and the forensic testing of his clothing. The Court orders that all statements that Defendant made to the police on November 18, 2014, after being transported to Boston Police headquarters, and all results of any forensic testing performed on clothing that was seized from Tremblay that day are hereby suppressed and may not be used as evidence against Defendant at trial. The motion is denied to the extent that it seeks suppression of any other evidence.

December 20, 2015

Kenneth W. Salinger
Justice of the Superior Court

1584CR10151 Commonwealth v Tremblay, Randall

Case Type	Indictment	Case Status	Open
Status Date:	04/06/2015	File Date	03/10/2015
Case Judge:		DCM Track:	C - Most Complex
Next Event:	01/21/2016		

All Information | Party | Charge | Event | Tickler | Docket | Disposition

Party Information

Commonwealth - Prosecutor

Alias

Attorney/Bar Code	Phone Number
Galatis, Esq., Amy Joy (650470)	
Smith, Esq., Janis DiLoreto (662332)	

More Party Information

Tremblay, Randall Dana - Defendant

Alias

Attorney/Bar Code	Phone Number
Hayes, Esq., John C (557555)	

More Party Information

Party Charge Information

Tremblay, Randall Dana - Defendant

Charge # 1 : 265/1-0 - Felony MURDER c265 §1

Original Charge	265/1-0 MURDER c265 §1 (Felony)
Indicted Charge	
Amended Charge	

Tremblay, Randall Dana - Defendant

Charge # 2 : 209A/7-3 - ABUSE PREVENTION ORDER, VIOLATE c209A §7

Original Charge	209A/7-3 ABUSE PREVENTION ORDER, VIOLATE c209A §7
Indicted Charge	
Amended Charge	

Events

Date	Session	Location	Type	Event Judge	Result
04/06/2015 09:30 AM	Magistrate's Session		Arraignment		Held as Scheduled
05/07/2015 02:00 PM	Criminal 6		Pre-Trial Conference		Rescheduled
05/19/2015 02:00 PM	Criminal 6		Pre-Trial Conference		Held as Scheduled
06/09/2015 02:00 PM	Criminal 6		Hearing		Held as Scheduled

Date	Session	Location	Type	Event Judge	Result
07/16/2015 02:00 PM	Criminal 6		Hearing RE: Discovery Motion(s)		Rescheduled
09/29/2015 02:00 PM	Criminal 6		Pre-Trial Hearing		Held as Scheduled
11/30/2015 10:00 AM	Criminal 9	BOS-7th FL, CR 713 (SC)	Evidentiary Hearing on Suppression		Held as Scheduled
01/21/2016 02:00 PM	Criminal 6	BOS-9th FL, CR 906 (SC)	Conference to Review Status		
03/28/2016 09:00 AM	Criminal 6		Jury Trial		

Ticklers

Tickler	Start Date	Days Due	Due Date	Completed Date
Pre-Trial Hearing	04/06/2015	0	04/06/2015	
Final Pre-Trial Conference	04/06/2015	346	03/17/2016	
Case Disposition	04/06/2015	360	03/31/2016	

Docket Information

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
03/10/2015	Indictment returned	1	
03/10/2015	MOTION by Commonwealth for arrest warrant to issue; filed & allowed (Laurat, J)	2	
03/10/2015	Warrant on indictment issued		
03/10/2015	Warrant was entered onto the Warrant Management System 3/10/2015		
03/10/2015	Notice & copy of indictment sent to Chief Justice & Atty General		
03/10/2015	Order of notice of finding of murder indictmen, Notice & copy of indictment of murder sent via fax to Sheriff/ J. Casey (Copy of verification in file)		
03/10/2015	Order of notice of finding of murder indictment		
03/12/2015	Order of notice of finding of murder indictment returned with service (Verification in file)		
04/06/2015	Defendant brought into court. The Order of Notice with return of service endorsed there on was received from the Sheriff and filed. Warrant ordered recalled.		
04/06/2015	Warrant canceled on the Warrant Management System 4/6/2015		
04/06/2015	Committee for Public Counsel Services appointed, pursuant to Rule 53, Atty. J. Hayes.		
04/06/2015	Court inquires of Commonwealth if abuse, as defined in G.L. c.209A, s1, is alleged to have occurred immediately prior to or in connection with the charged offense(s).		
04/06/2015	Court finds abuse is alleged in connection with the charged offense(s). (G.L. c.276 s56A) FILED UNDER SEAL.	3	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
04/06/2015	Deft arraigned before Court		
04/06/2015	Indictment read as to Offense #001.		
04/06/2015	Deft waives reading of indictment #002.		
04/06/2015	RE Offense 1:Plea of not guilty		
04/06/2015	RE Offense 2:Plea of not guilty		
04/06/2015	Bail: Defendant held on a Mittimus without bail without prejudice. Bail Warning Read. Mittimus Issued.		
04/06/2015	Motion Paper $3 filed UNDER SEAL.		
04/06/2015	Commonwealth files Notice of Appearance of ADA A. Galatis.	4	
04/06/2015	Commonwealth files Notice of Discovery I.	5	
04/06/2015	Assigned to track "C" see scheduling order		
04/06/2015	Tracking deadlines Active since return date		
04/06/2015	Continued to 5/7/2015 for hearing Re: PTC and setting of track by agreement. Kaczmarek, MAG - A. Galatis, ADA - J. Hayes, Atty - JAVS		
04/14/2015	Commonwealth files Notice of Discovery II	6	
04/21/2015	Commonwealth files Motion to Compel Buccal Swabs	7	
04/21/2015	Commonwealth files Motion for an Order of Production of Medical Records.	8	
05/07/2015	Defendant not in Court, present in lock up, Event not held.		
05/07/2015	Case continued to 5/19/2015 by agreement re: Setting of the Tracking Order, Pre-Trial Conference, Sixth Criminal Session, Ctrm 906 @2:00PM -Presence waived at the request of the Defendant. Locke, RAJ - A. Galadis, ADA - T. Hayes, Attoreny -		
05/19/2015	Defendant not in Court. Presence Waived, PTC held before Locke-RAJ.		
05/19/2015	Pre-trial conference report filed	9	
05/19/2015	Defendant files Motion for Discovery.	10	
05/19/2015	Defendant files Motion for Preservation, Review and Production of Notes.	11	
05/19/2015	Defendant files Ex Parte Motion for Funds for Forensic Pathologist with attached request to be impounded.	12	
05/19/2015	MOTION (P#12) allowed and IMPOUNDED(Jeffrey A. Locke, Regional Administrative Justice). Copy given to Atty J. Hayes in hand.		
05/19/2015	MOTION (P#8) allowed (Jeffrey A. Locke, Regional Administrative Justice). Summons to Issue.		
05/19/2015	Continued by agreement until 6/9/2015 @ 2:00pm re: Lampron Hearing and Hearing re: Buccal Swab (Ctrm 906) Jail List. Continued by agreement 03/28/16 re: Trial (Ctrm 906) Jail List. Locke-RAJ. - A. Galatis, ADA. - J. Hayes, Atty. J. Gartland, Atty. N. King, CR.		
05/22/2015	Summons issued for Records to Boston EMS, records returnable by 06/09/2015.		
05/26/2015	Commonwealth files Response to Defendant's Motion for Discovery	13	
06/02/2015	Hospital records from Boston EMS received Note: Counsel may receive copies		
06/09/2015	Defendant brought into court. Hearing re: Motion for Buccal Swab and Lampron Hearing held before Locke, RAJ		
06/09/2015			

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	After hearing: Paper #7- allowed as endorsed. Paper # 8- Commonwealth withdraws requests for Shattuck Hospital records. Paper #10- allowed as endorsed. Paper# 11- allowed as endorsed.		
06/09/2015	Commonwealth files Notice of Appearance of Janis Smith	14	
06/09/2015	Case continued to 7/16/15 by agreement for hearing re: ddiscovery motions in 906 at 2PM (presence waived). Out-of-court filing due by 7/13/15. Case continued to 9/29/15 by agreement for pre-trial hearing in 906 at 2PM (jail list). - Locke, RAJ - ADA A Galatis/J Smith - Atty J Hayes - King, N CR		
06/11/2015	Commonwealth files Notice of Discovery II	15	
07/16/2015	Defendant not present. Continued as previously scheduled for FPTC at 2:00 pm in 6th Session by agreement. Lauriat, J.		
09/29/2015	Event Result: The following event: Pre-Trial Hearing scheduled for 09/29/2015 02:00 PM has been resulted as follows: Result: Held as Scheduled. Continued to 11/30/15 re MTN to suppress. Lauriat, J. - K. King, CR Applies To: Commonwealth (Prosecutor); Hayes, Esq., John C (Attorney) on behalf of Tremblay, Randall D (Defendant)		
09/29/2015	Defendant 's Motion to dismiss with memorandum and affidavit in support	16	
09/29/2015	Defendant 's Motion to suppress with memorandum and affidavit	17	
09/29/2015	Commonwealth files certificate of compliance.	18	
10/22/2015	Commonwealth 's Notice of Discovery IV filed	19	
10/28/2015	Commonwealth 's Notice of Discovery V filed	20	
11/24/2015	Commonwealth 's Motion for an Order of Production of Medical Records, (Second) , filed.	21	
11/24/2015	Commonwealth's Memorandum in opposition to the Defendant's Motion to Dismiss the Indictments, filed.	22	
11/24/2015	Commonwealth's Memorandum in opposition to the Defendant's Motion to Suppress, filed.	23	
11/30/2015	Event Result: The following event: Evidentiary Hearing on Suppression scheduled for 11/30/2015 10:00 AM has been resulted as follows: Result: Held as Scheduled. Defendant brought into Court. After hearing, Motion to Dismiss P#16 and Motion to Suppress P#17 taken under advisement. Continued by agreement to 1/21/16 for Staus Sixth Session Courtroom 906. Salingder, J. - A. Galatis and J. Smith, ADA - J. Hayes and J. Garland, Attorney - Javs.		
11/30/2015	Randall D Tremblay's Memorandum in support of Motion to Suppress (Supplemental), filed.	24	
11/30/2015	Endorsement on Motion for and Order of Production of Medical Records (Second), (#21.0): DENIED Without Prejudice.		
12/09/2015	Commonwealth's Memorandum in opposition to the Defendant's Motion to Suppress (Supplemental), filed.	25	
12/09/2015	Commonwealth's Memorandum in opposition to the Defendant's Motion to Dismiss the Indictments (Supplemental), filed.	26	
12/20/2015	Findings of Fact and Rulings of Law: And Order Denying Defendant's Motion to Dismiss Indictments, filed. Copies mailed to both parties 12/21/15.	27	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
12/20/2015	Findings of Fact and Rulings of Law: And Order Allowing in Part Denying in Part Defendant's Motion to Suppress Evidence, filed. Copies mailed to both parties 12/21/15.	28	
12/21/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: John C Hayes, Esq. Attorney: Amy Joy Galatis, Esq. Attorney: Janis DiLoreto Smith, Esq. Holding Institution: Suffolk County Jail		
12/21/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: John C Hayes, Esq.		
12/21/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: John C Hayes, Esq. Attorney: Amy Joy Galatis, Esq.		

Case Disposition

Disposition	Date	Case Judge
Active	04/06/2015	

11/30/15
Hg.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
No. SUCR2015 - 10151

Transcripts → Tremblay Doucette Mair the rest

COMMONWEALTH

v.

RANDALL TREMBLAY

MOTION TO SUPPRESS

Now comes the defendant, and moves that this Court suppress the following evidence in this case: any evidence allegedly seized from the defendant, and any statements made by the defendant to any police officer, as a result of his seizure by the police on or about November 18, 2014. As grounds, the defendant asserts the following:

1. The initial stop and seizure of the defendant on November 18, 2014, by Boston Police, before an arrest warrant was discovered by the police, was in violation of the defendant's rights, because the police lacked probable cause to stop, search, or seize the defendant, the police did not have exigent circumstances allowing them to stop, search, or seize the defendant without a warrant, the police lacked probable cause to stop or arrest the defendant for any other violation of law, and the defendant did not voluntarily consent to the stop or search of his person, the inspection of his body, the seizure of any evidence from his person, or the seizure of any clothing or other personal items from his person.

2. Any statements of the defendant to the Boston Police, either at the scene of his arrest, during transport to the station, during booking, and during any interview with the police, were not voluntarily made by the defendant, and not made with an understanding of his rights sufficient for a voluntary waiver of those rights. The defendant was in custody and not free to leave when the police seized him and transported him to one or several police stations. The defendant was heavily intoxicated upon his arrest and remained intoxicated throughout the period that the police gave him any Miranda warnings and interviewed him. The defendant also suffers from mental conditions that affect his ability to understand and voluntarily waive his rights, and to make an intelligent and voluntary statement. The defendant was also led to believe by the police that his cooperation by making a statement would allow him to be released from custody, because the

police caused him to believe that they would consider releasing him instead of holding him on an arrest warrant after he spoke to them.

3. The police interviewed the defendant twice in the hours after his seizure. The first interview was not recorded by the police. Any evidence of his intoxication and mental condition at that time, any evidence of the Miranda warnings that might have been given to him and he understanding of those rights, and any evidence of the actual contents of his interview with the police during that first interview is lost. As a result, the Commonwealth cannot establish beyond a reasonable doubt that he voluntarily understood and waived his rights during that first interview. As a result, the second interview, which was recorded, is the illicit product of the first interview, because once he made that first statement, the "cat was out of the bag." Therefore, the second interview, and any collection of evidence as a result of these interviews, must be suppressed.

4. The seizure of the defendants clothing, and the collection of evidence from his person, during this seizure was not the product of a legitimate search incident to arrest. That seizure of clothing and collection of evidence was also not supported by probable cause to support such seizures, and there existed no exigency sufficiently necessary to justify such a seizure absent a search warrant. Even if these was a sufficient exigency for these seizures, there was no exigency that excused the police getting a search warrant before proceeding to alter and test those items.

As such, this evidence must be suppressed as violative of the defendant's rights under the fourth, fifth, sixth, and fourteenth amendments of the Unites States Constitution, Articles Twelve and Fourteen of the Declaration of Rights, Section One et seq. of Chapter 271 of the General Laws, and the Humane Practice Law of the Commonwealth.

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss: SUPERIOR COURT DEPARTMENT
NO(S): SUCR2015 - 10151

COMMONWEALTH

v.

RANDALL TREMBLAY

MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE

Admissibility of a defendant's statements in Massachusetts courts is governed by the so-called "Humane Practice" doctrine. In order to admit into evidence a defendant's custodial statement to police questioning, the court must make two findings. First, the court must find that the confession obtained by the police was given voluntarily by the defendant. Second, the court must find that the defendant knowingly and intelligently waived his rights under Miranda v. Arizona, 384 U.S. 436 (1966). On both issues, the Commonwealth bears the burden of proof beyond a reasonable doubt.

Unlike the lower standard dictated by federal law, Massachusetts requires that the Commonwealth establish the voluntariness beyond a reasonable doubt and with "unmistakable clarity." Commonwealth v. Tavares, 385 Mass. 140, 149-153 (1982). The courts of the Commonwealth closely scrutinize custodial statements for two separate reasons. First, confessions that are not voluntary are inherently unreliable. The Supreme Judicial Court in Commonwealth v. Mahnke, 368 Mass. 662 (1975), noted that a claim of untrustworthiness is implicit in the claim of involuntariness. The second concern is that

police coercion directed at eliciting a confession from a defendant ought not to be tolerated in civilized society.

It is well settled that a confession may be coerced in violation of the due process clause without the use of physical force. Commonwealth v. Makarewicz, 333 Mass. 575 (1956). The Due Process Clause bars the use of confessions secured with either physical or psychological coercion. Commonwealth v. Curtis, 388 Mass. 637, 650 (1983); Commonwealth v. Mahnke, 368 Mass. 662, 679 (1975). Among the factors a court must weigh when deciding whether a statement is voluntary is whether any promises or inducements were made, the conduct of the defendant, the defendant's age, education, intelligence and emotional stability, experience with and in the criminal justice system, physical and mental condition, the initiator of the discussion of a deal or leniency, and the details of the interrogation, including the recitation of Miranda warnings. Commonwealth v. Williams, 388 Mass. 846, 852 (1983). A statement will not be considered voluntary unless the defendant beyond a reasonable doubt knew of his rights as stated in the Miranda warnings, and intelligently waived those rights.

Whether a statement or confession was in a custodial situation is determined by whether the defendant was arrested or deprived of his freedom in any way. Commonwealth v. Bryant, 390 Mass. 729, 736 (1984). If the defendant was restrained in his freedom, or "reasonably perceived himself to be restrained," he is considered in custody. Id. at 739. Whether a statement was in response to interrogation is an objective test of whether "an objective observer . . . would infer that the police conduct was designed to elicit an incriminating response." Commonwealth v. Rubro, 27n Mass. App. Ct. 506, 512 (1989).

If the statement is custodial and in response to interrogation, then the court must consider not just whether the Miranda warnings were given to the defendant, but whether the defendant understood and intelligently waived those rights. The Court must further determine whether the defendant's emotional state at the time of the statement, as well as his intellectual ability, age, experience, and other factors, raise any reasonable doubt concerning the voluntariness of any statement.

Even if a statement by the defendant is not made during custodial interrogation, or even is made to a non-police officer, the statement is to be suppressed if the circumstances of the statement raise a reasonable doubt whether the statement was voluntary. Factors that would make a statement inadmissible include any coercion, threats, or promises, or any mental impairment of the defendant. See Commonwealth v. Mahnke, 368 Mass. 662 (1975); Commonwealth v. Louranie, 309 Mass. 28 (1983).

For these reasons, the defendant asserts that he did not understand the various legal warnings that must be given to him and understood by him before he could be interrogated. The defendant further asserts that he did not voluntarily waive those rights. Under the United States Constitution, the Declaration of Rights, and the Humane Practice Rule, any statements of the defendant must be suppressed.

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By his Attorney,

_____

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
No. SUCR 2015-~~01015~~ 10

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AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS

Randall Tremblay DWA

I, ~~Antonio Marcos Ferreira~~, hereby state that the following is true to the best of my knowledge and belief:

1. On or about November 18, 2014, I was stopped, seized, and searched by Boston police officers. I was not free to leave, and not free not to go with them to Boston Police Stations. I did not consent to being stopped, searched, and held by the police. I was not shown a search or arrest warrant.

2. After my seizure on November 18, 2014, those police officers brought me to the several Boston Police Stations, where I was kept, searched, and inspected by the police and other persons. While there, persons photographed me and wiped cloth or cotton on my hands and person. The police also searched and inspected my clothing, and took from me the clothing I had been wearing. I did not consent to be kept at the station, did not consent to be inspected or photographed, and did not consent to the seizure of the clothing.

3. During my arrest by the police they interviewed me twice. I was intoxicated when they interviewed me. I did not understand my rights related to my statements. I was led to believe that I might be released if I spoke with the police, and in my intoxicated state I spoke to them hoping to be released.

Signed under the pains and penalties of perjury this 29th day of September, 2015.

Randall Tremblay
RANDALL TREMBLAY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss: SUPERIOR COURT DEPARTMENT
NO(S): SUCR2015 - 10151

COMMONWEALTH

v.

RANDALL TREMBLAY

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS

1. VOLUNTARINESS OF STATEMENTS

Before any statement by a defendant to law enforcement officers or their agents may be admitted at trial, the Commonwealth must prove voluntariness beyond a reasonable doubt. For a judge to find that a defendant's statements are voluntary beyond a reasonable doubt, that conclusion "must appear from the record with unmistakable clarity." *Commonwealth* v. *Tavares*, 385 Mass. 140, 152 (1982), *quoting Sims* v. *Georgia*, 385 U.S. 538, 544 (1967). "It is not up to the defendant to establish involuntariness." *Commonwealth* v. *DiGiambattista*, 442 Mass. 423, 439 (2004). This inquiry involves both a determination of whether a defendant voluntarily and intelligently waives his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and also whether any statements were the product of a rational intellect. *Commonwealth* v. *Louraine*, 390 Mass. 28, 39 (1983). It is not enough to show that the defendant read the Miranda warnings, or had them carefully read to him; the Commonwealth must still show beyond a reasonable doubt that the right to remain silent and the right to counsel were voluntarily, knowingly and intelligently waived by the defendant. *Commonwealth* v.

Hooks, 375 Mass. 284, 288 – 89. "The Commonwealth must prove a knowing and intelligent waiver beyond a reasonable doubt." *Commonwealth* v. *Day*, 387 Mass. 915, 921 (1983). The defendant's mental condition, including intoxication, are factors in determining voluntariness. *Commonwealth* v. *Chung*, 378 Mass. 451 , 456-457 (1979). *Commonwealth* v. *Johnston*, 373 Mass. 21 , 25 (1977). *Commonwealth* v. *Mahnke*, 368 Mass. 662 , 690 (1975), cert. denied, 425 U.S. 959 (1976). A defendant's mental state, such as insanity, may deprive a defendant of freedom of choice, the ability to make a voluntary statement. *Eisen* v. *Picard*, 452 F.2d 860 (1st Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

To determine whether a defendant made a voluntary statement, a judge examines whether, "in light of the totality of the circumstances ... the will of the defendant was overborne to the extent that the statement was not the result of a free and voluntary act." *Commonwealth* v. *Selby*, 420 Mass. 656, 663 (1995). Under the "totality of the circumstances" test, the court should consider all of the relevant circumstances surrounding the statement and the individual characteristics and conduct of the defendant. *Commonwealth* v. *Parker*, 402 Mass. 333, 340 (1988), S.C., 412 Mass. 353 (1992), and 420 Mass. 242 (1995). Relevant factors include, but are not limited to, the "conduct of the defendant, the defendant's age, education, intelligence and emotional stability, ... physical and mental condition,... and the details of the interrogation, including the recitation of Miranda warnings." *Commonwealth* v. *Mandile*, 397 Mass. 410, 413 (1986); see *Commonwealth* v. *Meehan*, 377 Mass. 552 (1979). In considering evidence of intoxication or mental illness, the court may consider evidence of slurred speech, unsteadiness on his feet, alertness, incoherence, or detachment from reality.

Commonwealth v. *Judge*, 420 Mass. 433, 447 – 48 (1995). Whether a defendant's mental condition or intoxication renders him confused and lethargic, so that he was "indifferent to protect himself," is also a factor. *Pea* v. *United States*, 397 F.2d 627, 634 (D.C. Cir. 1967). The fact that a statement may have been made spontaneously is not sufficient, by itself, to establish voluntariness. *Chung*, 378 Mass. at 456 n.5. Whether a defendant's statements reveal a clear understanding of his circumstances is also a factor, as well as whether he has sufficient understanding of his circumstances to decide to assert his right to silence. *Commonwealth*. v. *Libran*, 405 Mass. 634, 639 – 40 (1989).

As indicated above, the burden rests on the Commonwealth to establish the voluntariness of a defendant's statements beyond a reasonable doubt. When, as here, the police failed to record a statement, that failure can prevent the Commonwealth from reaching that heavy burden. In *DiGiambattista*, the Court considered yet another case in which the police failed to record a statement, and noted that when, "as here, it is the Commonwealth that bears the burden of proof, gaps in that reconstruction [of what occurred during several hours of interrogation years earlier], and the inability to place the coercive features of the interrogation in their precise context, must result in suppression of the statement." 442 Mass. at 440. The Court noted that, although failure to record a statement would not automatically lead to suppression, "the lack of recording was itself a relevant factor to consider on the issues of voluntariness and waiver." *Id.* at 441 (citing *Commonwealth* v. *Diaz*, 422 Mass. 269, 273 (1996). The Court reasoned that "a judge may reasonably conclude that when the party with the burden of proof beyond a reasonable doubt on the issues of voluntariness and wavier deliberately fails to utilize

readily available means to preserve the best evidence of what transpired during the interrogation, it has not met that very high standard of proof." *Id.*

A further issue in this case is whether, if the Commonwealth failed to reach its heavy burden of proof involving the voluntariness of the first, unrecorded, statement, that failure fatally infects the second, recorded statement. The Court has held that the "cat-out-of-the-bag line of analysis requires the exclusion of a statement if, in giving the statement, the defendant was motivated by the belief that, after a prior coerced statement, his effort to withhold further information would be futile and he had nothing to lose by repetition or amplication of the earlier statements." *Mahnke*, 368 Mass. at 686; *see United States* v. *Bayer*, 331 U.S. 532, 540 – 41 (1947). Even when a subsequent statement includes a valid administration of the Miranda warnings, the Court "presume[s] that a statement made following the violation of a suspect's Miranda rights is tainted, and ... require[s] the prosecution [to] show more than the belated administration of Miranda warnings in order to dispel that taint." *Commonwealth* v. *Smith*, 412 Mass. 823, 836 (1992). The Court has therefore held that the presumption of taint of a statement made after an earlier, involuntary, statement, may only be overcome by either a showing that "there was a break in the stream of events that sufficiently insulated the post-Miranda statement from the tainted one," or that the involuntary statement was not in fact incriminatory, such that the cat was not out of the bag. *Commonwealth* v. *Osachuk*, 418 Mass. 229, 235 (1994).

In this case, the evidence establishes that the defendant was heavily intoxicated when he was arrested, and that his intoxication continued through his second, recorded, interview. MBTA video of the defendant shows him in an intoxicated condition, and

continuing to drink heavily. He is gesticulating wildly, and his balance is impaired. During the recorded interview, this condition continues, with the defendant needing assistance to enter the interview room, and losing his balance at one point while standing. His statements and behavior, including his manner of speech, indicate intoxication. Moreover, his appears to have no understanding at all of his circumstances. Although he admits to striking the victim many times and apparently causing her death, he continues to ask if he will be released. He continually returns to the issue of the warrant that led to his arrest, and cajoles the police to check out the warrant because he believes it is not valid and he can then be released. It is apparent throughout this second interview that the defendant's primary concern is being released, and that he believes that if he talks to the police, he will be able to convince them to release him. His behavior during the attempted effort by the police to read him his Miranda warnings itself raises substantial doubt as to whether he understood and intelligently waived those rights, versus his effort to rush through the warnings. His clear intoxication, coupled with his bizarre belief that he could admit to causing the death of the victim and then be released, can support no finding by this court other than that the Commonwealth has not met its heavy burden of showing that his statements in that interview were voluntary.

Unless the police allowed him to continue to drink after his arrest, the only fair assumption is that the defendant was even more intoxicated when he was first interviewed by the police. As stated in *DiGiambattista*, the failure of the police to record that first interview should itself, in these circumstances, provide reasonable doubt as to the voluntariness of the first statement. Whether the police failure to record that statement was deliberate, reckless, or excusable neglect, doesn't change the inability of

the Commonwealth to meet its burden of proof on the voluntariness of the unrecorded statement. The recorded statement was made a short time after the first interview, and there was therefore no "break in the stream of events" that would insulate the recorded statement from the unrecorded one. The first interview was clearly incriminatory. Therefore, if this court finds that the Commonwealth failed to prove the voluntariness of the first statement beyond a reasonable doubt, then the second interview must be found to be tainted by the first and also suppressed.

But the evidence from the second interview itself establishes the lack of voluntariness of that statement. The Court reasoning and holdings in *Commonwealth* v. *Hosey*, 368 Mass. 571 (1975), are instructive. The defendant in Hosey was intoxicated and had been arrested for intoxication. In suppressing Hosey's statements, the Court described remarkably similar behavior by Hosey to this defendant's videotaped behavior. Hosey was overly eager to speak with the police, responding to a request to talk with "yeah, man, let's talk." Hosey was described by the police as extremely emotional, high, and abnormal. He was doing a lot of motioning, and was "detached from reality." Although Hosey had no trouble walking, his speech ran together. Finally, the defendant rambled about how he needed the interview to end because he had to be at work soon. Hosey's statement was not itself a confession, but did provide impeachment evidence at trial. *Id.* at 575-76.

The Court found that these circumstances, coupled with the police telling him that it would be difficult to get a lawyer for him at that time, required a finding that Hosey did not waive his rights voluntarily. The Court specifically noted that "the police should have been sensitive to whether the defendant was genuinely in a position to understand

the significance of a waiver of his rights." The Court also reasoned that the police took advantage of Hosey's desire to get to work by telling him it would be difficult to get a lawyer at that hour, thereby encouraging him to waive his right to a lawyer. *Id.* at 577-78. Finding that the police should have ceased questioning until he was capable of responding intelligently, the Court stated that the police should have made "every effort" to insure that Hosey did not unknowingly relinquish basic constitutional protections indispensable to a fair trial. *Id.* at 578 – 79 (citing *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 242 (1973).

In the case at bar, the defendant's behavior and intoxication are comparable to that of *Hosey*. Instead of being sensitive to whether the defendant was able to intelligently waive his rights and make a statement, it appears that the police purposely sought to take advantage of his condition, even rushing back into the interview room with him to make a recorded statement after they apparently realized that the first interview was not recorded. In these circumstances, the Commonwealth cannot reach its heavy burden of showing the voluntariness of either of the defendant's statements, and they must be suppressed.

2. SEIZURE OF DEFENDANT'S CLOTHING

Section 1 of Chapter 276 of the General Laws requires the exclusion of any evidence of an unrelated crime found during a search incident to a lawful arrest unless that search was conducted to gather evidence of the that crime or to look for weapons, or unless the search was allowed under other provisions of the General Laws or common law. A search incident to arrest can only reach areas that might contain evidence of the

crime for which the defendant was arrested, or which might hold a weapon in certain circumstances not relevant here. *Commonwealth* v. *Cassidy*, 32 Mass. App. Ct. 160, 164 – 65 (1992).

Even if the defendant's clothing could be seized under an exigency rationale, this does not mean that the Commonwealth was then free to do whatever with the clothing. The exigency went no further, arguably, than the securing of the clothing, and did not obviate the need for a search warrant to conduct forensic testing of the clothing. *Commowealth* v. *Kaupp*, 453 Mass. 102, 106 n. 7 (2009). Once the clothes were seized, the police had ample opportunity to seek a search warrant before they further intruded upon the defendant's privacy by submitting the clothing for further testing.

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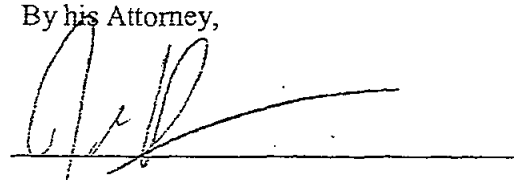
By his Attorney,



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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPT.
DOCKET NO. 2015SUCR10151

COMMONWEALTH

v.

RANDALL TREMBLAY

COMMONWEALTH'S OPPOSITION TO THE DEFENDANT'S MOTION TO SUPPRESS

Now comes the Commonwealth in the above-captioned matter, and respectfully moves that this Honorable Court DENY the defendant's Motion to Suppress. Specifically, the Commonwealth states that: (a) the arrest of the defendant was proper and pursuant to a warrant; (b) the statements made by the defendant on-scene were not the subject of custodial interrogation, and were voluntary; (c) the two statements made by the defendant at Boston Police Headquarters were made after the administration of *Miranda*, and were made freely and voluntarily; (d) the seizure of the defendant's clothing and other evidence from his person was proper; and (e) the motion filed by the defendant is procedurally deficient.

FACTS OF THE INSTANT MATTER

On November 18, 2014, at 2:17am, Boston Police responded to 1037 River Street, #4, Hyde Park. On arrival officers observed the victim, Stephanie McMahon, lying on a couch. She had what appeared to be blood on her face, around her body, on the floor of the apartment, and the baseboard to the rear of the couch. Her dentures were found on the TV stand, full of blood. She was declared non-viable by EMS at 2:21am. Police found the defendant, Randall Tremblay, outside of the apartment and arrested him on an outstanding warrant. He was later interviewed twice at Boston Police Headquarters. During the interviews, the defendant indicated that he was at the victim's

(who he identified as his best friend and someone with whom he had a sexual relationship) apartment and they had argued. He admitted that, during the course of the argument, he struck Ms. McMahon 10-15 times and "worked her over pretty good". At some point after the argument he covered her with a blanket. The defendant reported that, at some point, he left the apartment and traveled to the Back Bay MBTA Station and met up with two acquaintances. They returned to the apartment and the defendant mopped up blood from the floor and the walls and took a bag of trash out to the dumpster in the rear of the building. During both interviews, Mr. Tremblay stated "I fucked up", I probably killed her". He also acknowledged that he was aware of a restraining order that Ms. McMahon had against him that required that he stay away from her and her residence. The first interview was not recorded, as the officers mistakenly recorded the wrong interview room. The mistake was quickly discovered, and after a brief period where the defendant was allowed to go outside and have a cigarette, the defendant was re-administered his Miranda rights, was voluntarily re-interviewed by the same officers, and reiterated his initial statements.

The medical examiner after autopsy ruled Ms. McMahon's death a homicide, citing blunt force trauma to the head as the cause of death. The doctor noted a subdural hematoma with extensive intercranial bleeding on the left side of her head, with accompanying damage to her brain. Her face was swollen and bruised. The doctor also noted a large number of bruises on Ms. McMahon's body, especially on her legs.

The Commonwealth states that additional facts are included within this Opposition that will arise during the course of the evidentiary hearing, and requests the opportunity to supplement this memorandum with such facts, if needed.

ARGUMENT

I. The so-called initial stop and seizure of the defendant was proper, as well as the subsequent arrest, as it was pursuant to a warrant.

The first numbered paragraph of the defendant's Motion asserts that the "initial stop and seizure" of the defendant was a violation of the defendant's rights because the police lacked probable cause. The defendant conveniently leaves out of his Motion that the police had a valid outstanding warrant for his arrest, and also that he was the

defendant in a restraining order that required him to stay away from Ms. McMahon's residence. This information was verified by Boston Police officers before the defendant was arrested. The defendant was initially noticed by offers attempting to get a cigarette from one of the witnesses while standing outside of the victim's apartment building. Minutes later, the defendant was seen again outside of the victim's residence shouting "What's going on in there? She was my friend you know! I know what happened!" Two officers on scene, having previous interactions with the defendant, recognized him on sight and arrested him pursuant to the warrant. In addition, the officers had probable cause to arrest the defendant for violating a restraining order under **M.G.L. Ch. 209A s. 7**. *Commonwealth v. Harris,* 11 Mass. App. Ct. 165 (1981). Accordingly, there is no merit to the defendant's claim that his initial stop or arrest was improper.

II. Statements made by the defendant on scene did not require *Miranda* warnings, and were voluntary.

The defendant next claims that the police should have provided *Miranda* warnings at the scene. Again, he is wrong. *Miranda* warnings are required only when a person is subjected to custodial interrogation. *Commonwealth v. Morse*, 427 Mass. 117, 122-23 (1998). Custodial interrogation is "'questioning initiated by law enforcement officers after a person had been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *Id.*, quoting *Commonwealth v. Jung*, 420 Mass. 675, 688 (1995). The *Miranda* safeguards become applicable as soon as a suspect's freedom is curtailed to a degree associated with formal arrest. *Id.* Thus, before finding a *Miranda* violation, a judge must consider the totality of the circumstances and find that law enforcement officers subjected a suspect to a formal arrest or an equivalent restraint on his or her freedom of movement. *Id.* "There is no requirement that [*Miranda*] warnings be given prior to '[g]eneral on-the scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process.'" *Commonwealth v. McNelley*, 28 Mass. App. Ct. 985, 986, (ultimately quoting *Miranda v. Arizona*, 384 U.S. 436, 477 (1966)), *rev. denied*, 408 Mass. 1101 (1990).

The defendant's various statements made at the scene ("I know what happened", etc.) were made before he was placed under arrest for the warrant, before he was in

custody, and not at the prompting or even while in conversation with police officers. Spontaneous statements that are not the product of interrogation do not fall under the *Miranda* rule. *See Commonwealth v. Fortunato,* 446 Mass. 500, 511 (2013) ("We have stated repeatedly that statements initiated spontaneously and voluntarily by a defendant are not the product of police questioning."), citing *Commonwealth v. Koumaris,* 440 Mass. 405, 409 (2003); *Commonwealth v. Duguay,* 430 Mass. 397, 401 (1999); *Commonwealth v. Diaz,* 422 Mass. 269, 271 (1996). See also *Commonwealth v. Gittens,* 55 Mass. App. Ct. 148, 150 (2002); *Commonwealth v. King,* 17 Mass. App. Ct. 602 (1984). The defendant's on-scene statements were spontaneous, and thus are not subject to suppression.

Interrogation is defined as "express questioning or its functional equivalent." *Rhode Island v. Innis,* 446 U.S. 291, 300-301 (1980). *See Commonwealth v. Sheriff,* 425 Mass. 186, 198 (1997). This includes "any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect". *Commonwealth v. Rubio,* 27 Mass. App. Ct. 506, 512 (1989), quoting from *Rhode Island v. Innis,* 446 U.S. at 301. See *Commonwealth v. Morse,* 427 Mass. 117, 123 (1998); *Commonwealth v. Clark C.* 59 Mass. App. Ct. 542 (2003). In the present case, there was no interrogation of the defendant. The defendant was heard yelling outside of the victim's apartment building, asking for information as to what was going on. An officer went out to speak with him, and the defendant continued to question and speak with that officer. In these circumstances, the defendant is not entitled to the protections of *Miranda.*

III. The formal statements made by the defendant after he was arrested were made after the administration of the *Miranda* warnings, and were voluntarily.

Under the *Miranda* decision, law enforcement officers are required to apprise criminal defendants of certain constitutional rights before engaging in custodial interrogation. *See Miranda v. Arizona,* 384 U.S. 436 (1966). It is the Commonwealth's burden to prove, beyond a reasonable doubt, that the police complied with the requirements of Miranda, and that any waiver was knowing, intelligent and voluntary. *Commonwealth v. Day,* 387 Mass. 915, 920-21 (1983); *Commonwealth v. Edwards,* 420

Mass. 666, 670 (1995); *Commonwealth v. Magee*, 423 Mass. 381, 386 (1996). In the present matter, the defendant received his Miranda warnings after his arrest by Officer Shawn Roberts and acknowledged his understanding of those rights. Before the first formal interview, the defendant was again given his Miranda rights and acknowledged his understanding by initialing and signing the Boston Police Miranda Form in the presence of two officers. Before the second interview, the defendant was given his *Miranda* rights a third time, and acknowledged his understanding again in the presence of two officers.

His various statements were likewise voluntary. As the court is well aware, any statements made by a defendant are admissible only if they are voluntarily made. *Commonwealth v. Sheriff*, 425 Mass. 186, 193 (1997); *Commonwealth v. Mahnke*, 368 Mass. 662 (1975). The test for voluntariness is whether, in the totality of the circumstances, the defendant's will was overborne to the extent that his/her statement was not the result of a free and voluntary act. *Commonwealth v. Souza*, 428 Mass. 478, 483-84 (1998); *Commonwealth v. Garcia*, 379 Mass. 422, 428 (1980); *Commonwealth v. Raymond*, 424 Mass. 382, 395 (1997). In examining voluntariness, courts examine whether

> in light of the totality of the circumstances surrounding the making of the statement, the will of the defendant was overborne to the extent that the statement was not the result of a free and voluntary act. Relevant factors include whether promises or other inducements were made to the defendant by the police, as well as the defendant's age, education, and intelligence; experience with the criminal justice system; and his physical and mental condition, including whether the defendant was under the influence of drugs or alcohol. The mere presence of one or more factors is not always sufficient to render the statements involuntary.

Commonwealth v. Howard, 469 Mass. 721, 727-28 (2014). Other factors to be considered include, but are not limited to: "(1) the time and conditions under which the questioning took place; (2) the content and form of the questions put to the defendant...; and (3) the physical and mental condition of the defendant during the period during which he was questioned." *Miller* at 843 (quoting *Commonwealth v. Makarewicz*, 333 Mass. 575 (1956)).

In the present case, there are no indicators of coercion or duress. There was no physical harm or threat of physical harm to the defendant. The demeanor of the officers and the defendant was at all times casual and non-confrontational. There were no promises made for leniency or offers to help, there were no attempts at deception, and no other factors or conditions of the interview that support the defendant's claim of involuntariness. The defendant answered all questions directly and coherently, corrected the officers when they misspoke or misunderstood him, and at his own election withheld information that the officers asked for. When the officers notified the defendant of the error in recording, the defendant agreed to be re-interviewed if they allowed him to smoke a cigarette. The officers agreed, and the defendant was escorted outside of the building with two uniformed officers to smoke. During the second interview, the defendant asked for and was given water. Given all these circumstances, there is no merit to the defendant's argument that the statements made were done so involuntarily. *Cf. Commonwealth v. Selby*, 420 Mass. 565, 658, 664 (1995) (officer falsely told defendant that they had received handprint from scene, but not even this lie rendered statement involuntary); *contra Commonwealth v. Meehan*, 377 Mass. 552, 561-63 (1979) (statement involuntary where officers gave misleading account of strength of the evidence against the defendant); *Commonwealth v. Magee*, 423 Mass. 381, 387-88 (1996) (defendant's statement not voluntary where officers promised her mental treatment in exchange for her statement). *Commonwealth v. Fernette*, 398 Mass. 658 (1986) (even fact that defendant was hungry and tired during interrogation did not render statement involuntary).

The defendant in his motion alleges that the "loss" of the first formal interview of the defendant requires suppression because, without the recording, the Commonwealth cannot establish beyond a reasonable doubt that he voluntarily understood and waived his *Miranda* rights. The defendant neglects to mention that the interviews were conducted by two Boston Police officers, both whom wrote reports (one in great detail), and one of whom testified in the grand jury specifically about both interviews. Both the report and the grand jury testimony establish the circumstances of the interviews, the

content, and any statements that differed from the first and second interviews.[1] In addition, the lack of a recording for the first interview does not mandate its exclusion, or the exclusion of the second interview. The rule in *Commonwealth v. DiGiambattista*[2] is very clear; it is not a rule of exclusion, or a prerequisite for admissibility. *DiGiambattista.* at 448-49. There, the court held that the lack of a recording of a suspect's interview has significance only as a factor in assessing voluntariness of a *Miranda* waiver[3]; and that the lack of recorded interview entitles the defendant, upon request, to a specific jury instruction.[4] In this case, there is no meritorious argument by the defendant to indicate that this contributed to voluntariness, or that the lack of an electronic recording covered up any misconduct by the officer. In fact, the *DiGiambattista* decision is not even cited in the defendant's Motion or Memorandum. The defendant is therefore not entitled to the suppression of his statements to police for this reason.

The defendant also alleges that he was "heavily intoxicated" and mentally ill, and his statements were therefore involuntary. As this court is well aware, there is no per se rule of exclusion for statements given by individuals suffering from mental illness, even severe psychotic conditions. *Commonwealth v. Vazquez,* 387 Mass. 96 (1982). A statement is only inadmissible if it would not been obtained but for the effects of the mental illness. Id. at 100. Courts continue to employ the "totality of the circumstances" test to determine whether a waiver is valid in the fact of a defendant's mental illness. *Commonwealth v. Jones,* 439 Mass. 249 (2003). Mental illness does not automatically present a defendant from knowingly, voluntarily, and intelligently waiving his Miranda rights. *Commonwealth v. Libran,* 405 Mass. 634 (1989) (though psychiatrist testified that the defendant suffered from schizophrenic reaction and manic depressive condition, judge found that he was able to make a valid waiver because he did not manifest any bizarre demeanor or unusual behavior, his answers were clear and appropriate, and he appeared composed); *Commonwealth v. Rivera,* 441 Mass. 358 (2004) (schizophrenia diagnoses and medications which caused memory problems and gullibility did not

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[1] The recording of the second formal interview was an exhibit for the grand jury, and has been provided to defense counsel.
[2] *Commonwealth v. DiGiambattista,* 442 Mass. 423 (2004).
[3] *Id.* at 441.
[4] *Id.* at 447-48.

prevent defendant from making a valid waiver given his responses and demeanor during questioning). In the present matter, while it is averred in the body of the defendant's Motion, there is nothing in the defendant's affidavit which indicates that he suffers from a mental illness. There were no statements made by the defendant to officers at any time that either expressly or implicitly gave rise to a mental illness issue. No records, diagnoses, or other materials have been provided to the court or Commonwealth in support of this assertion by the defendant. The defendant's actions and conduct during the interviews were not unusual or bizarre, his responses to questions were accurate, he did not seem confused, and he was cooperative during the police interview. Suppression is thus unwarranted.

While there is some indication that the defendant may have been drinking alcohol, the defendant's assertion of "heavy intoxication" is a far cry from establishing that fact. Even if he was, in fact, intoxicated, the courts have clearly ruled that intoxication alone is not enough to negate voluntariness. *Commonwealth v. Hooks*, 375 Mass. 284 (1978); *Commonwealth v. Meehan,* 377 Mass. 552 (1979) (reaffirmed intoxication would not alone justify the suppression of a statement of admission); *Commonwealth v. Doucette*, 391 Mass. 443 (1984). Indeed, "An otherwise voluntary act is not necessarily rendered involuntary simply because an individual has been drinking or using drugs." *Doucette* at 448. The court looks to a number of factors regarding whether a statement should be admitted. The suspect's outward behavior and assurances of sobriety and understanding is key in this determination. *Commonwealth v. Garcia*, 379 Mass. 422 (1980), *Commonwealth v. Silanskas*, 433 Mass. 678 (2001) (while odor of alcohol was apparent on defendant's breath, his answers were responsive, coherent, and he could understand the inquiries posed to him); *Commonwealth v. Mello,* 420 Mass. 375 (1995) (defendant spoke coherently, appeared sober, and did not have any difficulty understanding questions).

Here, there is no indication that the defendant was confused or had trouble understanding the officers. There is similarly no evidence that his answers were inappropriate or garbled, or that his will was being overborne. The defendant did not make any statements that he was intoxicated, and he did not slur his words during the

interaction. Lastly, the fact that the defendant asserts that he suffers both from mental illness *and* was under the influence of substances does not on its own prove a waiver is invalid. In the *Crawford* case, the court ruled that the presence of mental illness and drug/alcohol abuse was not sufficient on its own to suppress the defendant's statement in a murder case. *Commonwealth v. Crawford*, 429 Mass. 60 (1999).

The *McCray*[5] case is particularly on point. In that matter, the defendant along with several others tied up, beat, burned, stabbed and murdered a 19 year old girl. The defendant alleged in his Motion to Suppress Statements that he was intoxicated, possibly retarded, and/or suffered from some mental illness, which rendered his statements to police inadmissible. he Supreme Judicial Court upheld the motion judge's findings and decision: the interview's tone was business-like and normal, there was no evidence of any trickery or coercion, the defendant's responses were appropriate, he appeared to have his self-interest in mind, he exhibited no evidence of mental illness or inebriation, his attitude was matter of fact and cooperative, and he had a familiarity with concepts of criminal law. *McCray* at 552. Citing well-known case law, the SJC reiterated that while mental retardation or mental illness are relevant, the do not preclude the making of voluntary statements or waivers. *Id. at 554.* Evidence of impairments such as these (as well as intoxication) only requires suppression where the defendant is rendered incapable of giving a voluntary statement or waiver. *Id.* Similarly, in this matter the defendant and officers spoke to each other in a casual manner, the defendant was clear in his statements and responses, he clarified items and even corrected the officers. There was no evidence whatsoever that the defendant's will was overborne due to supposed intoxication or mental illness. In fact, the evidence as it stands indicates that the defendant's last drink was a beer, with two of the witnesses, before 911 was called at approximately 2:10 a.m. In between that time and the interview, he had the foresight to clean up the blood and leave the apartment before police arrived. The first formal interview of the defendant was three hours later, and the second interview was more than four hours later. It strains credulity to suggest that,

[5] *Commonwealth v. McCray*, 457-544 (2010).

under these circumstances, the defendant's intoxication and mental illness rendered his coherent and cogent statements to the police involuntary.

Lastly, the defendant alleges that his statement was not voluntary because he was supposedly led to believe that he would be released if he spoke with the police after the second interview. However, during the second interview the defendant is repeatedly and consistently told not that he would be released, but only that the officers would check into the warrant to see if it was still valid. The defendant raises this question numerous times, and is always given the same answer: he would not be released, they would only verify whether the warrant was active. The defendant also invokes the "cat of the bag" language from *Commonwealth v. Mahnke*[6] in his entreaty for suppression. Under *Mahnke* and progeny, if a court determines that an initial statement is determined to be involuntary, a subsequent statement made by a defendant is not per se inadmissible. Most poignantly for this matter, a line of analysis in this determination is the presence of the defendant's purported "fear, [the]continuation of coercive effects, and a sense of futility of attempting to 'get the cat back in the bag'". *Commonwealth v. Pileeki,* 62 Mass. App. Ct. 505, 508 (2004). While the burden of proof is on the Commonwealth to show voluntariness in this respect by a preponderance of the evidence, the defendant fails in his burden of production. None of this case law, nor facts to support it, are drawn out in the defendant's Motion or Affidavit. There is no indication of police misconduct, or that the defendant's statements were anything but voluntary.

IV. The seizure of the defendant's clothing was done properly as a search incident to his arrest, and proper observation of the officers of evidence to the crime of murder.

Police officers are permitted to conduct a warrantless search of an individual's person, and the areas within his immediate control, at the time the individual is lawfully arrested. *Commonwealth v. Dessources,* 74 Mass. App. Ct. 232, 234-237 (2009). This includes allowing officers to seize evidence of a crime before they can be concealed or destroyed. *Chimel v. California,* 395 U.S. 752, 763 (1969); *Commonwealth v. Phifer,* 463

[6] 368 Mass. 662 (1975).

Mass. 790, 793-94 (2012). Specifically, the police may search for and seizure evidence of a crime that the police have probable cause to believe the defendant had on his person at the time of his arrest. *Commonwealth v. Madera*, 402 Mass. 156, 159 (1988). Statute also provides this tool to the police under **M.G.L. ch. 276, s. 1**: "A search conducted incident to an arrest may be made only for the purposes of seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made, in order to prevent its destruction or concealment[.]" As there was a valid warrant for the defendant's arrest, the police in this matter had the right to seize obvious evidence of the crime: the defendant's clothing. In addition, the defendant's filings do not, and cannot, provide any rule or case law that substantiates his assertion that the Commonwealth needs to obtain a search warrant in order to conduct forensic testing on evidence properly acquired.

V. The Motion to Suppress, Memorandum and Affidavit filed by the defendant are procedurally deficient.

According to Mass. R. Crim. P. Rule 13, "a pretrial motion shall be in writing and signed by the party making the motion or the attorney for that party." In addition, any pretrial motion must state the grounds on which it is based, and include an affidavit detailing facts relied upon in support of the motion, signed by a person with personal knowledge of the factual bases of the motion. **Mass. R. Crim. Pro. Rule 13(a)(2).** *Commonwealth v. Robles*, 48 Mass.App.Ct. 490, 491 n.1 (2000). The Rule goes on to requires a memorandum of law for any motion that seeks the suppression of evidence, except for that seized during a warrantless search. **Mass. R. Crim. Pro. Rule 13(2)4).**[7] "Where a defendant has filed a motion to suppress alleging an unconstitutional search or seizure, the detail required in the motion and accompanying affidavit under rule 13(a)(2) must be sufficient to accomplish two practical purposes: First, it must be sufficient to enable a judge to determine whether to conduct an evidentiary hearing (citations omitted). ... Second, the affidavit required under

[7] "No motion to suppress evidence, other than evidence seized during a warrantless search, ... may be filed unless accompanied by a memorandum of law".

rule 13(a)(2) must be sufficiently detailed to give fair notice to the prosecution of the particular search or seizure that the defendant is challenging, so that the prosecution may determine which witnesses it should call and what evidence it should offer to meet its burden." *Commonwealth v. Mubdi,* 456 Mass. 385, 389 (2010); *Commonwealth v. Quint_Q.*, 84 Mass.App.Ct. 507, 514-515 (2013); *Commonwealth v. Rivera*, 429 Mass. 620, 623 (1999). In *Commonwealth v. Zavala*, 52 Mass. App. Ct. 770 (2001), the court ruled that a motion to suppress and supporting affidavit were general in nature, failed to meet the requirements of Rule 13, and the Appeals Court affirmed a Superior Court's refusal to act upon the defendant's motion. Indeed, in *Commonwealth v. Daniel J. Gomes*, the Appeals Court in an unpublished decision noted that an affidavit by the defendant's student attorney, not based on personal knowledge, "should not even have been scheduled for an evidentiary hearing."[8] In the instant case, as in *Zavala*, the Defendant's motion, memorandum and affidavit fail to conform with the requirements of Rule 13. In *Zavala*, the Defendant's affidavit contained the following general affirmations:

> "On 8 November 1996, officers of the Springfield Police Department stopped and searched Jose A. Vargas . . . During the course of the searches, a quantity of what is alleged to be a controlled substance was seized . . . [s]ubsequently, I was charged with the above captioned indictments"

Remarkably, the affidavit submitted by counsel for the defendant here is similarly general and non-specific. The affidavit fails to contain facts in support of most of the allegations in the defendant's Motion, and lacks particularity as required by Rule 13. "The requirement of really adequate affidavits should be strictly enforced as a matter of good judicial administration." *Commonwealth v. Burke,* 20 Mass. App. Ct. 489, 504 (1985) (quoting *Commonwealth v. Benjamin*, 358 Mass. 672, 676 n. 5 (1971)). The memorandum of law similarly does not include

[8] *Commonwealth v. Daniel J. Gomes*, June 2, 2014 (unpublished).

any discussion of the law with regards to the stop and arrest of the defendant, the seizure of his clothing, and several supposedly applicable theories of suppression with regards to his statements to police. In *Commonwealth v. Pope*, 15 Mass. App. Ct. 505, 507 (1983), the court wrote "a judge is not obligated to consider a motion to suppress that does not meet the requirements of Rule 13." *Zavala*, 52 Mass. App. Ct. 770). The purpose of the strictures of Rule 13 are evident: the affidavit must fairly notify both the court, and the prosecution, of what evidence is sought to be suppressed, and under what theories. *Mubdi* at 389; *Commonwealth v. Rodriguez*, 456 Mass. 578, 589 (2010). The Court in *Mubdi* also made it clear that an affidavit that fails to follow Rule 13 gives the Court grounds to consider requiring that the defendant comply with the rule by submitted a more particularized affidavit, or to deny the motion outright. *Mubdi* at 389; *Rodriguez* at 589. The defendant has proffered no just cause for the lack of compliance. For these reasons, the court should deny the Defendant's motion without an evidentiary hearing.

CONCLUSION

For the reasons stated herein, the Commonwealth is respectfully requesting that this Honorable Court DENY the defendant's Motion to Suppress.

Respectfully Submitted,

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Date: 11/23/15

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPT.
DOCKET NO. 2015SUCR10151

COMMONWEALTH

v.

RANDALL TREMBLAY

COMMONWEALTH'S SUPPLEMENTAL OPPOSITION TO THE DEFENDANT'S MOTION TO SUPPRESS

Now comes the Commonwealth in the above-captioned matter, and respectfully submits this supplemental memorandum of law. Specifically, during the hearing on the Motions to Dismiss and Suppress, defense counsel filed a new Supplemental Memorandum to address the issue (among other topics) of forensic testing that was performed on the defendant's clothing. While the defense conceded that the items seized from the defendant after his arrest were properly acquired by the police, it challenged the testing of said items without a search warrant. The Commonwealth respectfully refers the court to the cases and argument below.

ARGUMENT

As explained in the Commonwealth's Initial Opposition, the police are permitted to seize evidence of a crime, including the defendant's clothing, at the time of his arrest. *Commonwealth v. Madera*, 402 Mass. 156, 159 (1988); *Commonwealth v. Dessources*, 74 Mass. App. Ct. 232, 234-237 (2009); *Commonwealth v. Robles*, 423 Mass. 62, 67-68 (1996). The defendant was arrested pursuant to a valid warrant, and was observed wearing clothing and sneakers that had visible blood stains on them. Contrary to the defendant's assertion, there is no requirement for the police or the Commonwealth to obtain a search warrant in order to conduct testing on items properly seized. "[T]he

Filed 12-9-15

Supreme Judicial Court has concluded that where the police have lawfully obtained evidence, it may be subjected to scientific testing." *Commonwealth v. Aviles*, 58 Mass. App. Ct. 459, 463 (2003) (in a child rape case, defendant filed motion to suppress warrantless DNA testing results of clothing that revealed defendant's sperm and DNA, SJC affirmed denial of motion and convictions). *See also Robles*, 423 Mass. at 65 n.8. In *Robles*, the defendant was convicted of first degree murder, armed robbery, and unlawful possession of a firearm. The police recovered the coat the defendant had worn the night of the murder, and had it forensically tested for blood, without a warrant. In unequivocal language, the Supreme Judicial Court stated that the defendant's argument that a warrant was necessary for chemical analysis of the coat was "without merit". *Id. at 65, n.8. See also Commonwealth v. Varney*, 391 Mass. 34, 38-39 (1984) (court explicitly refused to hold that police must obtain a warrant before lawfully obtained evidence can be subject to scientific testing).

The case cited in the defendant's supplemental filing, *Commonwealth v. Kaupp*[1], is not remotely applicable. In that matter, the defendant was convicted of possession of child pornography. There, police seized the defendant's computer and searched it pursuant to a warrant. The question in that case was whether the search warrant was sufficient to establish probable cause. As the *Kaupp* case dealt with the search of a computer, and not forensic testing of evidence, it is irrelevant.[2]

CONCLUSION

For the reasons stated herein, at the Motion hearing, and in the previously filed Opposition, the Commonwealth is respectfully requesting that this Honorable Court DENY the defendant's Motion to Suppress.

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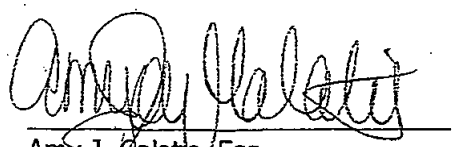
[1] 453 Mass. 102, 106 n. 7 (2009).

[2] The search of a computer can be analogized to the search of a closed container. *Commonwealth v. McDermott*, 448 Mass. 750, 776, 771 (2007).

Respectfully Submitted,



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Date: December 9, 2015

Motion to Suppress

Date: 11-30-15

Suffolk, ss.

No. 15-1615 1

Superior Court for Criminal Business

Commonwealth of Massachusetts

v.

Randall Tremblay

LIST OF EXHIBITS

Exh # 1 Boston Police Dept Miranda Warning Form

Exh # 2 Restraining Order

Exh # 3 DVD

Exh # 4 DVD

Exh # 5 Photograph

Exh # 6 Photograph

Exh # 7 Photograph

Exh # 8 Photograph

Exh # 9 DVD

Exh # 10

Exh # 11

Exh # 12

Exh # 13

Exh # 14

Exh # 15

Exh # 16

Exh # 17

Exh # 18

Motion to Suppress

Date 11-30-15

Docket No. 15-1015

COMMONWEALTH

v.

Randall Tremblay

Date ↓	WITNESSES WHO TESTIFIED FOR THE COMMONWEALTH
11-30-15	Sgt. Scott Yanovitch Boston Police Department
11-30-15	Officer Shawna Roberts Boston Police Department
11-30-15	Sgt Detective Michael Strathern Boston Police Dept
	WITNESSES WHO TESTIFIED FOR THE DEFENDANT
	JUDGE Salinger, J
	ASSISTANT DISTRICT ATTORNEY A. Galatis and J. Garland
	ATTORNEY FOR THE DEFENDANT J. Hayes and J. Smith
	CONVICTED UNDER GENERAL LAWS CHAPTER §

BostonPolice DEPARTMENT

Miranda Form

Before we ask you any questions, you must understand your rights:

1. You have the right to remain silent. R.T. (initials)
2. Anything you say can be used against you in a court of law. R.T. (initials)
3. You have the right to talk to a lawyer for advice before we ask you any questions and to have him/her with you during questioning. R.T. (initials)
4. If you cannot afford a lawyer and you want one, a lawyer will be provided for you by the Commonwealth at no cost. R.T. (initials)
5. If you decide to answer now, you will still have the right to stop answering questions at any time. R.T. (initials)
6. I understand these rights. R.T. (initials)

Name: RANDALL TREMBLAY (Print Name)

Signed: Randall Tremblay

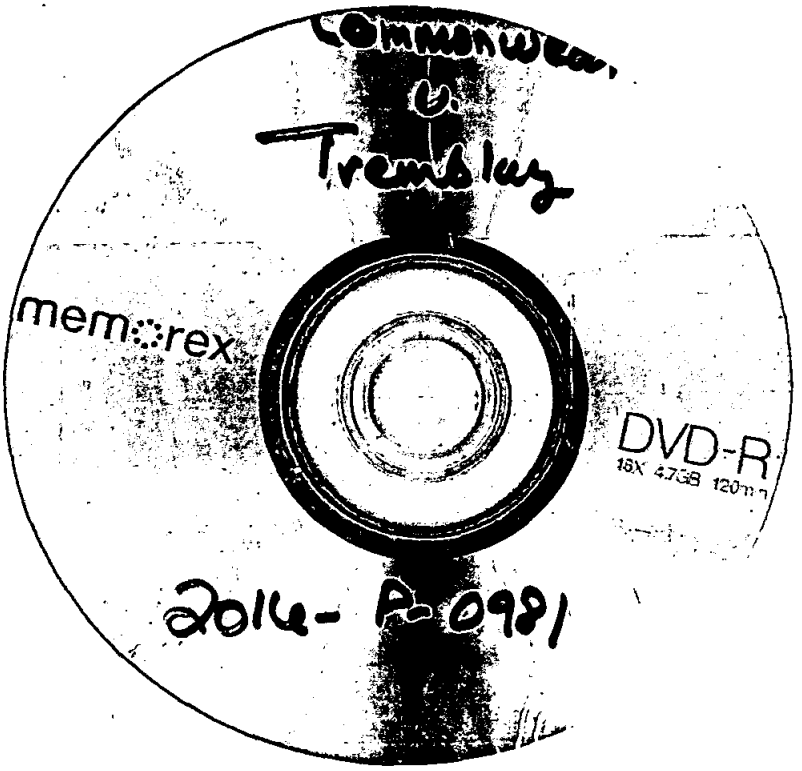
Administered by: SGT. DET. MICHAEL STRATTON ID#: 10305

Witnessed by: DET. DAVID O'SULLIVAN ID#: 10297

Date: 11/18/14 Time: 05:00 Place: HQ - HOMICIDE

I# 142-049954

Boston Police Department
Miranda Form
0078-BFS-0214


Commonwealth
v.
Tremblay
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2014-P-0981

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPT.
DOCKET NO. 2015SUCR10151

COMMONWEALTH

v.

RANDALL TREMBLAY

COMMONWEALTH'S NOTICE OF INTERLOCUTORY APPEAL

Now comes the Commonwealth and respectfully submits this notice, pursuant to Rule 15 of the Massachusetts Rules of Criminal Procedure, of its intent to appeal certain findings, rulings, and orders of the Court in a decision dated December 20, 2105 allowing in part the defendant's motion to suppress statements and evidence.

Respectfully submitted
For The Commonwealth,

DANIEL F. CONLEY
District Attorney
For the Suffolk District

Amy J. Galatis, Esq.
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December 29, 2015

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify under the pains and penalties of perjury that I have today made service on defendant's counsel by sending a copy of the attached notice by first-class mail, to John Hayes, Esq.

AMY J. GALATIS
Assistant District Attorney

December 29, 2015

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

SUFFOLK, ss. SJ-2015-561

COMMONWEALTH OF MASSACHUSETTS,
Petitioner

v.

RANDALL TREMBLAY,
Defendant & Respondent

COMMONWEALTH'S MASS. R. CRIM. P. 15(a)(2) AND G.L. c. 278, § 28E APPLICATION REQUESTING THE SINGLE JUSTICE REVERSE THE ORDER OF THE SUFFOLK SUPERIOR COURT ALLOWING THE DEFENDANT'S MOTION TO SUPPRESS

Pursuant to Mass. R. Crim. P. 15(a)(2) and G.L. c. 278, § 28E, the Commonwealth of Massachusetts respectfully requests that this Honorable Court reverse the order of the lower court (Salinger, J.) allowing the defendant's motion to suppress statements and the results of forensic testing from clothing lawfully seized from the defendant (C.A. 1-11).[1]

The defendant has been indicted for the murder of Stephanie McMahon in November, 2014. The cause of the victim's death was blunt force trauma to the head. In the early morning hours of Tuesday, November 18, 2014,

[1] References to the Commonwealth's appendix will be cited as (C.A. __). References to the motion to suppress hearing exhibits will be cited as (Exh. __).

the defendant gave a recorded statement to Boston Police Detectives Michael Stratton and David O'Sullivan. The defendant moved to suppress all statements that he made to the police, as well as evidence, including clothing, seized from him at the time of his arrest. In suppressing statements made after the defendant was transported to Boston Police Headquarters, the motion judge erroneously concluded that the Commonwealth had failed to meet its burden that the defendant made a knowing and voluntary waiver of his *Miranda* rights and his right to counsel because he was too intoxicated (C.A. 1). The motion judge further wrongly concluded that, while the defendant's clothing was lawfully seized, the police unlawfully subjected it to further forensic testing without obtaining a search warrant (C.A. 1).

As the video recording of the defendant's statement demonstrates, the defendant waived his *Miranda* rights knowingly, intelligently, and voluntarily, and any level of alcohol consumption did not render that waiver invalid. Moreover, because the police lawfully seized the defendant's clothing, they were not required to obtain a search warrant before subjecting the clothing to forensic testing. *Commonwealth v. Arzola*, 470 Mass. 809 (2015). Thus, the Commonwealth respectfully requests that the Single Justice hear its appeal and reverse the lower court's

order allowing the motion to suppress. In the alternative, the Commonwealth requests that it be allowed to appeal the order to the Appeals Court.

I. STATEMENT OF THE CASE

On March 10, 2015, a Suffolk County grand jury returned indictments charging the defendant with murder, in violation of G.L. c. 265, § 1, and violating an abuse prevention order, in violation of G.L. c. 209A, § 7 (C.A. 12-13). On September 29, 2015, the defendant filed a motion to dismiss the indictments and a motion to suppress evidence and statements, along with a memorandum of law and a supporting affidavit (C.A. 13, 17-24). On November 24, 2015, the Commonwealth filed oppositions to the motion to dismiss and the motion to suppress (C.A. 33-45). On November 30, 2015, the defendant filed a supplemental memorandum in support of his motion to suppress (C.A. 13, 25-32).

On November 30, 2015, the Superior Court (Salinger, J.) heard argument concerning the motion to dismiss (C.A. 13). Additionally, an evidentiary hearing was conducted concerning the motion to suppress (C.A. 13). Following the hearing, on December 9, 2015, the Commonwealth submitted

supplemental memoranda in opposition to the motion to dismiss and the motion to suppress (C.A. 13, 46-48).

On December 20, 2015, the motion judge issued findings of fact and rulings of law allowing, in part, the motion suppress statements and allowing the motion to suppress the results of forensic testing on clothing lawfully seized from the defendant (C.A. 1-11, 13). The motion judge also issued an order denying the defendant's motion to dismiss (C.A. 13-14). The Commonwealth received these decisions on December 24, 2015, and filed a timely notice of appeal on December 29, 2015 (C.A. 53-54).

II. STATEMENT OF FACTS

A. The Events Leading to the Murder of Stephanie McMahon and the Arrest of the Defendant[2]

Stephanie McMahon and the defendant, Randall Tremblay, were involved in an on-and-off romantic relationship. The relationship was troubled, and the victim had an active restraining order against the defendant. The victim suffered from addiction problems, and was known to use vodka, marijuana, and

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[2] Section A of this statement of facts is taken in large part from the Commonwealth's opposition to the defendant's motion to dismiss. It is meant to give the Court a synopsis of the circumstances leading to the allegations against the defendant.

cocaine. The defendant similarly suffers from cocaine addiction and abuses alcohol.

About a week before her death, the victim had called a friend, Michael Doucette, crying because the defendant had stolen her EBT card and had left her with no food. Doucette bought her some groceries, and ended up staying overnight on her couch. He advised her to stay away from the defendant. That was the last time Doucette saw the victim alive.

The next Monday, November 17, 2014, the defendant saw Gay Finley, the victim's friend, on Boylston Street in Boston. He told Finley that the victim had been evicted from her apartment, and that she wanted him to sell her television. The defendant and Finley walked to Back Bay train station and were talking and laughing and having drinks.

A short time later, Doucette and the defendant went to a liquor store on Boylston Street to buy beer. They were unable to buy it themselves, but had someone else purchase Bud Light for them instead. They went back to Back Bay station, and the defendant pulled Doucette aside and said to him that he thought the victim was dead. At first, Doucette thought that he was joking, but the defendant jingled her keys and

cell phone in front of him. The defendant told Doucette that he had been trying to wake the victim since Sunday night at 9:00 P.M. (over 24 hours). Doucette questioned what the defendant meant, and the defendant explained that she was not breathing and reiterated that he had tried to wake her up. When Doucette asked why the defendant had not contacted the police, the defendant replied that he was scared and that the victim had an active restraining order against him. The defendant told Doucette that he did not know what to do and said that he needed Doucette to help him and to go with him to the victim's apartment. They invited Finley to join them.

The defendant, Doucette, and Finley, took public transportation to the victim's apartment. On the way, the defendant told Finley that the victim was dead. Finley thought that he was exaggerating, and told him to stop saying that. The defendant repeated that the victim was dead. When they arrived at the victim's apartment, 1037 River Street in Hyde Park, the defendant used the keys to open the door. Finley ran to the bedroom to check on the victim, but she was not there. When she asked where the victim was, the defendant told her that she was on the couch.

Indeed, the victim was lying on the couch covered with two blankets. Doucette pulled the blankets off of her head and he and Finley observed injuries to the victim's head, face, and hands, and saw that there was blood on the wall and on a nearby carpet. The defendant told Doucette that she had fallen and hit her head on the kitchen table. The defendant attempted to clean up the blood with a mop. Finley ultimately called the police and the defendant left the apartment. He took a trash bag with him.

B. The Motion Judge's Findings of Fact.

Judge Salinger made the following findings of fact:

> The Court heard testimony from Boston Police Sgt. Scott Yanovitch, Ofc. Shawn Roberts, and Sgt. Det. Michael Stratton during an evidentiary hearing held on November 30, 2015. The Court credits their testimony to the extent it is consistent with the explicit findings of fact made below. In addition, the Court received into evidence a number of exhibits. The Court makes the following findings of fact based on this evidence and on reasonable inferences it has drawn from this evidence.
>
> 1.1. **Initial Response to Crime Scene.** Shortly after 2:00a.m. on Tuesday, November 18, 2014, the Boston police received a 911 call reporting that a woman had died at a home in the Hyde Park section of Boston. Ofc. Landrom and two Emergency Medical Services ("EMS") personnel responded to the scene first.

They found the victim, Stephanie McMahon, lying dead on a very bloody couch with a blanket over her. McMahon's face was bruised and bloodied. Michael Doucette and Gay Finley were in the apartment. Ms. Finley had called 911.

Sgt. Yanovitch arrived just after EMS had pronounced McMahon to be dead. Yanovitch asked the police dispatcher to issue "full notifications," which means that the police have found a dead person and that all relevant units, including a homicide detective, should respond to the scene. Yanovitch spoke separately with Doucette (who smelled of alcohol and acted intoxicated) and Finley (who did not). The full notifications went out around 2:50 a.m. Sgt. Det. Michael Stratton of the homicide unit was notified about the matter by page. He drove from his home in Hopkinton to the crime scene.

Ofc. Roberts and Ofc. Laden[3] [sic] were on patrol together that night in a marked police cruiser. Roberts recognized the Hyde Park address because he had been there a couple of months earlier when McMahon reported that her window had been damaged. He kn[e]w from that prior call that Ms. McMahon had called the police on several occasions regarding alleged domestic violence against her by Randall Tremblay. As a result, when Roberts heard by radio the issuance of "full notifications" for McMahon's address, he used his mobile data terminal to look up previous police reports regarding that address. That led him to check Tremblay's online criminal record. Roberts learned that there was an active restraining order requiring Tremblay to stay away from McMahon's residence, as well as an active arrest warrant against Tremblay for failing to register with the sex offender registration board. Roberts was able to pull up and view one or more booking photos of Tremblay, so he now knew what Tremblay looked like.

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[3] The correct spelling of the officer's name is "Layden."

1.2. **Tremblay's Behavior at the Crime Scene.** Over the next hour or so Sgt. Yanovitch observed a man who turned out to be Mr. Tremblay hanging out near Ms. McMahon's apartment. The first time, Yanovitch had stepped outside the apartment to get some fresh air when he noticed Tremblay walk past. Tremblay was talking and mumbling to himself.

The second time, Doucette asked if he could go outside to smoke a cigarette. Yanovitch went with him. Tremblay again walked by, still talking to himself. Tremblay asked Doucette for a cigarette. Yanovitch told Tremblay to move along. At around this time, Roberts completed his online research of McMahon and Tremblay, and contacted Yanovitch by radio to report what he had learned. Roberts explained the apparent history between McMahon and Tremblay, and informed Yanovitch about the restraining order and arrest warrant that had been issued against Tremblay. Sgt. Yanovitch asked Ofc. Roberts to come to the Hyde Park address, take a look at Doucette, and determine whether he looked like Tremblay. Roberts arrived at the scene a few minutes later. He told Yanovitch that Doucette was not Tremblay, and did not appear to have been involved in any of the prior domestic violence incidents against McMahon. Roberts then left the scene. Yanovitch and Doucette went back inside the apartment.

The third time, Yanovitch was inside the apartment when he heard someone yelling loudly outside. Yanovitch went out and discovered that Tremblay was doing the yelling. Tremblay was on the sidewalk yelling things like "What's going on in there?", "I know what happened," and "She was my friend." Tremblay then walked up to Yanovitch and again asked "what's going on in there?" and again said "she was my friend." Yanovitch asked Tremblay "What's your name?" Tremblay did not answer, but instead said "What, are you going to run me?" Yanovitch then radioed Roberts and asked him to come back to the scene to determine whether this second man was Tremblay. By now it was around 3:40 a.m.

When Ofc. Roberts and Ofc. Laden [sic] returned to McMahon's apartment, Mr. Tremblay was still with Sgt. Yanovitch. Roberts recognized Tremblay from his booking photo. Roberts told Yanovitch that the man who had been yelling was Tremblay, and that there was an outstanding arrest warrant against him.

Roberts and Laden [sic] approached Tremblay. Roberts could smell alcohol on Tremblay. Roberts told Tremblay that he had an outstanding arrest warrant, and that he was therefore under arrest. He and Laden [sic] placed Tremblay in handcuffs. Tremblay said he had paperwork in his pocket showing that the arrest warrant had been recalled. Roberts looked at the paperwork and saw that it concerned a different warrant. But he nonetheless took Tremblay's ID, went back online using the mobile data terminal in his cruiser, and confirmed that there was an active warrant for Tremblay's arrest. Roberts then read Tremblay his *Miranda* rights from a laminated card. Tremblay never said whether he understood those rights or not.

Roberts and Laden [sic] drove Tremblay to Boston Police headquarters in their marked police cruiser. Tremblay was in the rear seat and was handcuffed during this ride. During the drive, Tremblay kept asking if he was going to be released, because the arrest warrant was a mistake. Tremblay said nothing about McMahon's death during this ride. Upon arrival, the officers brought Tremblay to the homicide unit on the second floor.

The police also transported Doucette and Finley to police headquarters to be interviewed by a homicide detective. The detectives interrogated Tremblay before speaking with Doucette or Finley. The Commonwealth presented no evidence regarding what, if anything, the police learned from Doucette or Finley either at the crime scene, later at police headquarters, or at any other time.

1.3. **First Interrogation of Tremblay.** Sgt. Det. Michael Stratton interviewed Mr. Tremblay in an interview room for about an hour, beginning at around 4:30 a.m. (The Court credits the date and time stamp on the recording of the wrong room, and does not credit the inconsistent time that someone wrote on the *Miranda* form discussed below).[4] Stratton believed that the interview was being recorded. Unfortunately, whomever turned on the recording equipment did so for the wrong interview room. The room where Gay Finley was sleeping was recorded for that hour. Stratton's interview of Tremblay was not. Stratton took no notes, because he thought the interview was being recorded. Although no other police officer was present in the interview room with Stratton and Tremblay[5], Ofc. Roberts observed and listened to the interview on the recording system's monitor outside the interview room.

At the beginning of this first interview, Sgt. Det. Stratton told Tremblay that the interview was being recorded. He then read Mr. Tremblay his *Miranda* rights from a preprinted form. Tremblay put his initials next in each spot that Stratton told him to initial, and signed his name where Stratton told him to sign. Over the next hour, Tremblay made statements implicating himself in McMahon's death. Tremblay said that he had been with McMahon Sunday night, that they got into an argument, that he used his hands to strike McMahon in the head twelve to fifteen times, that Tremblay "got her good," and that "I think I killed her." Tremblay told Stratton that when he woke up Monday morning McMahon's body was cold and he believed she was dead, that Tremblay then left the apartment and found Mr. Doucette,

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[4] Concerning the time of the interview, the only evidence adduced was from Sergeant Detective Stratton who testified that he noted the time from his cellular phone.

[5] Judge Salinger's finding on this point is wrong. Detective David O'Sullivan was also present in the room when the defendant was first interviewed. Detective O'Sullivan did not testify at the motion hearing.

that they drank some beer together, and that Tremblay, Doucette, and Doucette's friend returned to McMahon's apartment. Tremblay said he mopped up some big puddles of blood in the apartment and took out some trash. Tremblay also said that he drank some more beer in the apartment, finishing the last one just before Finley called 911. The Court credits Ofc. Roberts testimony that during the whole time that Tremblay was confessing he had killed McMahon, he still kept saying that the warrant for his arrest for failing to register as a sex offender was a mistake, and he still kept asking when he was going to be release[d].

For the reasons explained below, the Court finds that Tremblay was intoxicated throughout this first interrogation.

1.4. **Cigarette Break.** After Stratton completed the interview and left the interview room, he learned that the wrong room was recorded. Stratton was upset. He went back to Tremblay, explained that the interview had accidently not been recorded after all, and asked Tremblay if he would agree to a second interview, to go over the same things that Tremblay had already explained to Stratton, but this time to have it all be recorded. Tremblay said that he wanted to have a cigarette first.

Ofc. Roberts and Ofc. Laden [sic] then brought Mr. Tremblay to a fire exit door so that he could smoke a cigarette. They handcuffed Tremblay's wrists together in front of his body.

During this ten minute break, Tremblay kept asking when he was going to get out. Tremblay did not understand that he had just incriminated himself by confessing he had killed McMahon, that his statements were going to be used against him, and that therefore the police were not going to let him go but instead were going to hold him and charge him with killing McMahon.

1.5. **Second Interrogation of Tremblay.** Stratton interviewed Tremblay a second time, beginning

around 5:50 a.m. The second interview was recorded. Having viewed and listened to the entire recording several times, the Court finds that Tremblay was quite intoxicated throughout that interview and that he did not knowingly and intelligently waive his Miranda rights.

Sgt. Det. Stratton never asked Mr. Tremblay if he had been drinking alcohol, had taken any kind of legal or illegal drugs, or was unable to focus or understand what was happening for some other reason. The Court finds that Stratton knew that Tremblay had been drinking, that he should have known that Tremblay was acting like he was drunk or similarly incapacitated, and that Stratton therefore should have asked Tremblay questions to determine whether Tremblay was intoxicated and whether he had the capacity to understand what he was doing in waiving his *Miranda* rights. The Court finds that Stratton never did so.

When Tremblay was brought back to the interview room, he walked past Michael Doucette, who was eating somewhere nearby. Tremblay tried to get food from Doucette. At one point Tremblay said to Doucette, "Mike, give me an English muffin, will you?"

Tremblay was stumbling around and very unsteady on his feet when he was brought back into the interview for the second interrogation. In the recording of this interview Tremblay sounds drunk and seems to have trouble speaking clearly, as Sgt. Det. Stratton is taking off his handcuffs. Once his cuffs are off, Tremblay had great difficulty walking just a few steps to his seat. He stumbles several times before managing to sit down.

Tremblay asked "Am I out of here or not?" Stratton replied "Pretty soon." Tremblay then asked "Straight up?" It is apparent that Stratton[6]

[6] This appears to be a typographical error in the motion judge's findings. It is clear from the context

still did not understand that having incriminated himself by confessing that he beat McMahon to death he was not going to be released.

Once Tremblay was seated, he paid very little attention while Stratton tried to review the *Miranda* form with him. At some point Tremblay reached across the table and started playing with Stratton's pen and the papers he had in front of him. Stratton did not ask Tremblay to sign a new *Miranda* form, but instead shows Tremblay the one he previously signed. Stratton finally gets Tremblay to say that he understood all of his *Miranda* rights. The Court finds, however, that Tremblay was not focused at this point and was paying very little attention to the rights that Stratton read to him from the *Miranda* form.

During the second interview, Tremblay once again admits that he repeatedly hit McMahon in the head, and in so doing he killed McMahon. At one point Tremblay said "She's dead because of me." At another he said "I did whack her." Stratton has Tremblay explain in some detail exactly what Tremblay recalled happening the night he killed McMahon, and what Tremblay did after waking up the next morning and finding that McMahon was dead.

Although Tremblay again admitted that he had killed McMahon, during the second interview Tremblay kept asking when Stratton is going to let him go. Toward the end of the second interview Tremblay said ''You're gonna let me go now, right?" and "Let me walk out of here." After the interview was completed, and Stratton was guiding Tremblay out of the interview room, Tremblay kept asking when Stratton was going to let him go.

The Court finds that at the end of the second interview Tremblay still did not understand that he had incriminated himself, and that police were going to use Tremblay's

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that he is discussing the defendant, and not Sergeant Detective Stratton.

statements against him, and that the police were going to arrest Tremblay for killing McMahon and thus would not be letting him go.

Since it is apparent that Tremblay was quite intoxicated throughout the second police interrogation, the Court infers and therefore finds that he was even more drunk during the first interview.

1.6. **Arrest of Tremblay for Murder and Seizure of his Clothing.** Based on Tremblay's statements, Sgt. Det. Stratton arrested Mr. Tremblay for murder. The police brought Tremblay downstairs for full photographs, not just the standard booking photos. Stratton saw that one of Tremblay's sneakers and one of his socks appeared to have blood on them. Based on Tremblay's admissions during the two interviews, Stratton seized all the clothing that Tremblay was wearing at that time. The police performed various forensic tests on that clothing, and determined that every article of clothing Tremblay had been wearing tested positive for the presence of human blood. The police never sought or obtained any search warrant before testing Tremblay's clothing.

(C.A. 1-8).

C. **The Motion Judge's Rulings of Law.**

Judge Salinger denied the defendant's motion with respect to statements that the defendant made prior to being interviewed at Boston Police Headquarters (C.A. 11). He allowed the motion with respect to any other statements (C.A. 11). In doing so, he ruled that the defendant was "far too intoxicated" to be able to make a knowing and voluntary waiver of his *Miranda* rights, and that Sergeant Detective Stratton

knew or should have known that the defendant was intoxicated and should have stopped the second interview (C.A. 9). Judge Salinger further ruled that the "inadvertent failure to record the first interview of Tremblay at police headquarters leaves substantial doubt as to whether Tremblay made a knowing and intelligent waiver" of his rights (C.A. 10).

With respect to the defendant's clothes, Judge Salinger ruled that the police lawfully seized them, but were required to seek a warrant before conducting any forensic testing, and thus suppressed the forensic test results of the blood stains on his clothing (C.A. 10).

III. LEGAL ARGUMENT

I. GRANTING THE COMMONWEALTH'S APPLICATION WOULD FACILIATE THE ADMINISTRATION OF JUSTICE, BECAUSE THE COMMONWEALTH WOULD OTHERWISE BE UNFAIRLY DEPRIVED OF EVIDENCE CRUCIAL TO PROVING ITS CASE AGAINST THE DEFENDANT.

The Commonwealth is authorized under Mass. R. Crim. P. 15(a)(2) to apply to this Court for leave to appeal from a suppression order. This Court should grant the application upon finding that the appeal would facilitate the administration of justice. *See Commonwealth v. Dunigan*, 384 Mass. 1, 3-5 (1981). Here, the defendant has been indicted for murder.

Because evidence of his statements about the murder and the DNA profile of the victim from the blood that was on the defendant's shirt, both of which link him to the crime scene, has been suppressed, an appeal would facilitate the administration of justice by preventing the Commonwealth from being deprived of essential evidence against the defendant. In such cases, "the Commonwealth's right to present legal evidence, if not vindicated at this stage, might be irretrievably lost." *Commonwealth v. Boswell*, 374 Mass. 263, 267 (1978). Therefore, an interlocutory appeal would serve the interests of justice.

II. **THE MOTION JUDGE ERRED IN CONCLUDING THAT THE COMMONWEALTH DID NOT MEET ITS BURDEN TO DEMONSTRATE THAT THE DEFENDANT HAD MADE A KNOWING AND VOLUNTARY WAIVER OF HIS *MIRANDA* RIGHTS WHEN HE CHOSE TO SPEAK WITH DETECTIVES TWICE IN THE AFTERMATH OF THE MURDER AND FURTHER ERRED IN SUPPRESSING THE RESULTS OF FORENSIC TESTING REVEALING THE VICTIM'S DNA PROFILE ON THE DEFENDANT'S LAWFULLY SEIZED CLOTHING.**

In reviewing a motion to suppress, a court will accept the motion judge's findings of fact unless there is clear error and "make an independent determination of the correctness of the judge's application of constitutional principles to the facts as found." *Commonwealth v. Tremblay*, 460 Mass. 199, 205 (2011); *accord Commonwealth v. Mercado*, 422 Mass.

367, 369 (1996). "Where the motion judge's findings of fact are premised on documentary evidence, however, the case for deference to the trial judge's findings of fact is weakened." *Commonwealth v. Clarke*, 461 Mass. 336, 340 (2012). Thus, this Court will take "an independent review" of the video evidence as it is "in the same position as the [motion] judge in viewing the videotape." *Id.* at 341 (citations omitted).

Here, the motion judge's findings concerning the statements are contrary to the video recording, and this Court will review them *de novo*. Based on the totality of the circumstances, the motion to suppress should have been denied where the defendant voluntarily waived his *Miranda* rights before speaking with the detectives, and where the defendant's clothing was lawfully seized and a search warrant was not required before testing what appeared to be blood evidence on that clothing.

A. The Motion Judge Erred Because The Defendant Knowingly, Intelligently, And Voluntarily Waived His *Miranda* Rights.

The motion judge wrongly concluded that the Commonwealth did not prove beyond a reasonable doubt that the defendant validly waived his *Miranda* rights (C.A. 11). The defendant's *Miranda* waiver form (Exh. 1 at C.A. 51), the video depicting the recorded

interview (Exh. 4)[7], and the totality of the circumstances contradict the motion judge's conclusion and require reversal.

Both the United States Constitution and the Massachusetts Declaration of Rights prohibit the government from compelling criminal defendants to provide incriminatory evidence against themselves. U.S. Const. amend. V; Mass. Const. pt. 1, art. XII. To ensure that a criminal defendant is not compelled to provide self-incriminating testimony in derogation of these rights, a layer of prophylaxis is required, including the so-called *Miranda* warnings. *Maryland v. Shatzer*, 130 S. Ct. 1213, 1219 (2010); *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966). Under *Miranda*, the Commonwealth must prove beyond a reasonable doubt that the criminal defendant voluntarily, knowingly, and intelligently waived his rights before it can use a statement elicited during custodial interrogation against the defendant at trial. *Commonwealth v. Hensley*, 454 Mass. 721, 730 (2009); *Commonwealth v. Jones*, 439 Mass. 249, 256 (2003). Even after a defendant waives these rights, he may thereafter assert them at any time during the interrogation. *Miranda*, 384 U.S. at 473-74; *Commonwealth v. Obershaw*, 435 Mass. 794, 800 (2002); *Commonwealth v. Fowler*, 431

[7] A copy of the recording is appended to the instant petition.

Mass. 30, 37-38 (2000). In determining whether police officers adequately conveyed the *Miranda* warnings, "reviewing courts are not required to examine the words employed 'as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably conve[y] to [a suspect] his rights as required by *Miranda*.'" *Florida v. Powell*, 130 S. Ct. 1195, 1204 (2010), quoting *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989).

In the present case, Sergeant Detective Stratton reviewed the Boston Police Department *Miranda* Warning form with the defendant before beginning both interviews -- even though the defendant had received *Miranda* warnings when he was arrested on a warrant just a few hours earlier for failure to register as a sex offender (C.A. 4, 5, 7, Exh. 1 at C.A. 51).

During the unrecorded statement, Sergeant Detective Stratton read the defendant his *Miranda* rights, and the defendant initialed and signed the form (C.A. 5). During the recorded video, Sergeant Detective Stratton went through each of the *Miranda* rights with the defendant: the right to remain silent and that anything the defendant said could be used against him in court; the right to ask a lawyer for advice before questioning or to have a lawyer present during questioning; that if he could not afford a lawyer, one would be provided at no cost; and the

right to stop questioning at any time (Exh. 1 at C.A. 51, Exh. 4). Again, the defendant clearly reiterated that he understood his rights and the judge's finding that he was not paying attention to the warnings is belied by the recording (Exh. 4) and thus clearly erroneous. The defendant initialed and signed the *Miranda* waiver form during the first interview, reviewed the form during the second, and confirmed that he understood the rights that he was waiving (Exh. 1 at C.A. 51, Exh. 4). *See e.g., Commonwealth v. Perez*, 411 Mass. 249, 255 (1991), citing *Commonwealth v. Day*, 387 Mass. 915, 919-20 (1983) ("We have ruled the use of a card containing the *Miranda* warnings sufficient to advise a defendant of his rights, if it appears that the defendant has read the card and indicates an understanding of what he has read").

Accordingly, it is clear from the record -- including the videotape and the defendant's signed *Miranda* waiver form -- that he received and waived his *Miranda* rights before speaking with the officers and that he was not intoxicated, but even if he was, he was not so intoxicated that he was unable to waive his rights in an intelligent, knowing, and voluntary manner. *See Commonwealth v. Lopes*, 455 Mass. 147, 167 (2009) (defendant was twice given complete *Miranda* warnings; each time he was read each right verbatim

from a form, stated that he understood each right, and signed his name to the form, indicating that he understood the rights and waived them voluntarily and wished to make a statement); *Commonwealth v. Murphy*, 442 Mass. 485, 494 (2004) (police officer's scrupulous administration of *Miranda* warnings where officer stopped to ask defendant whether he understood each right and gave him *Miranda* form to sign and read, helped show that defendant's *Miranda* waiver was valid); *Commonwealth v. Raymond*, 424 Mass. 382, 393 (1997) ("once the [*Miranda*] warnings are read, the defendant presumably understands that he need not answer any questions the police pose").

"Because defendant was advised of, and waived, his [*Miranda*] rights, the issue becomes whether the Commonwealth has proved, by a totality of the circumstances, that defendant made a voluntary, knowing, and intelligent waiver of his rights, and that his statements were otherwise voluntary." *Commonwealth v. LeBeau*, 451 Mass. 244, 255 (2008). "A statement is voluntary if it is the product of a 'rational intellect' and a 'free will,' and not induced by physical or psychological coercion." *Commonwealth v. LeBlanc*, 433 Mass. 549, 554 (2001), citing *Commonwealth v. Mandile*, 397 Mass. 410, 413 (1986). The test for voluntariness is whether

> in light of the totality of the circumstances surrounding the making of the statement, the will of the defendant was overborne to the extent that the statement was not the result of a free and voluntary act. Relevant factors include whether promises or other inducements were made to the defendant by the police, as well as the defendant's age, education, and intelligence; experience with the criminal justice system; and his physical and mental condition, including whether the defendant was under the influence of drugs or alcohol. The mere presence of one or more factors is not always sufficient to render the statements involuntary.

Commonwealth v. Howard, 469 Mass. 721, 727-28 (2014). Although "special care must be taken to assess the voluntariness of a defendant's statement where there is evidence that he was under the influence of alcohol or drugs, an 'otherwise voluntary act is not necessarily rendered involuntary simply because an individual has been drinking or using drugs.'" *Commonwealth v. Brown*, 462 Mass. 620, 627 (2012), quoting *Commonwealth v. Silanskas*, 433 Mass. 678, 685 (2001).

The motion judge's finding that the defendant was "far too intoxicated" to make a knowing, voluntary, and intelligent waiver of his right to remain silent or obtain counsel during both interviews (C.A. 9) is simply contrary to the evidence and contrary to the recording itself (Exh. 4). As this Court is well

aware, there is no *per se* rule of exclusion for statements given by individuals who have consumed alcohol. Instead, there are myriad cases affirming the principal that even those who unquestionably display signs of intoxication are able to voluntarily provide a statement to the police. *See, e.g., Brown*, 462 Mass. at 627 (even though the defendant's speech was "sluggish" from being under the influence of drugs, his statements were voluntary where "there [was] nothing to suggest that he was acting irrationally or was out of control, or that his denials were induced by psychological coercion"); *Commonwealth* v. *Simmons*, 417 Mass. 60, 65-66 (1994) (even where the defendant's speech was slurred due to intoxication, his statements were voluntary when the police could understand him, when he walked without difficulty, and when he appeared to understand what was happening); *Commonwealth* v. *Liptak*, 80 Mass. App. Ct. 76, 80-82 (2011) (even though the defendant was intoxicated, his statements were voluntary because he was coherent and because he understood and responded to questions asked of him, and because he was alert and spoke in a cogent manner). In determining whether the level of intoxication prevented the defendant from

being able to validly waive his rights, the defendant's outward behavior is key. *Commonwealth v. Garcia*, 379 Mass. 422 (1980); *Silanskas*, 433 Mass. at 678 (while odor of alcohol was apparent on defendant's breath, his answers were responsive, coherent, and he could understand the inquiries posed to him); *Commonwealth v. Mello*, 420 Mass. 375 (1995) (defendant spoke coherently, appeared sober, and did not have any difficulty understanding questions).

Here, while there is some indication that the defendant may have been drinking alcohol, the motion judge's finding that his intoxication rendered him unable to make a valid waiver is contradicted by what is seen on the video (Exh. 4). *Howard*, 469 Mass. at 727 (videotape of booking confirmed that, though intoxicated, the defendant's statement was voluntary where he was able to follow commands, answer questions, carry on conversations, and maneuver without assistance). Even if the defendant had been drinking at some point earlier that day, or the night before, or was even to some extent intoxicated, intoxication alone is not enough to negate voluntariness. *Commonwealth v. Hooks*, 375 Mass. 284 (1978); *Commonwealth v. Meehan*, 377 Mass. 552 (1979)

(reaffirming that intoxication does not alone justify the suppression of a statement of admission); *Commonwealth v. Doucette*, 391 Mass. 443 (1984). In fact, there is no indication that the defendant was confused or had trouble understanding the officers (Exh. 4). There is similarly no evidence that his answers were inappropriate or garbled, or that his will was being overborne (Exh. 4). The defendant did not make any statements that he was intoxicated, and he did not slur his words during the interaction (Exh. 4). The defendant appropriately responded to the officers questions, knew when to withhold information (i.e., when asked to provide Doucette's last name, the defendant declined for fear of getting Doucette in trouble), and knew to withhold certain details of the assault on the victim (i.e., the defendant only admitted to using an open hand to hit the victim) (Exh. 4), was able to recall a telephone number (Exh. 4), was able to relay specific details of what had occurred over the course of the days leading up to the victim's death (Exh. 4), and even corrected the detectives when they made mistakes repeating what he had said (Exh. 4). This is not the behavior of a man who was too intoxicated to appreciate the rights he is

afforded. That the motion judge apparently finds it incredible that someone would waive these rights and speak so candidly to the police does not change what actually occurred - that is, the defendant made the conscious and rational decision to knowingly, voluntarily, and intelligently forego them.

Commonwealth v. McCray, 457 Mass. 544, 553-55 (2010), is instructive. There, the defendant along with several others tied up, beat, burned, stabbed and murdered a 19 year old girl. *Id.* at 547. The defendant moved to suppress statements and asserted that he was intoxicated, possibly retarded, or suffered from some mental illness, which rendered his statements to police inadmissible. *Id.* at 549. The Supreme Judicial Court upheld the motion judge's denial of the defendant's motion that concluded that the interview's tone was business-like and normal, that there was no evidence of any trickery or coercion, that the defendant's responses were appropriate, that he appeared to have his self-interest in mind, that he exhibited no evidence of mental illness or inebriation, that his attitude was matter of fact and cooperative, and that he had a familiarity with concepts of criminal law. *Id.* at

552. Citing established precedent, the Supreme Judicial Court reiterated that, while mental retardation or mental illness are relevant, they do not preclude the making of voluntary statements or waivers. *Id.* at 554. Evidence of impairments such as these, as well as intoxication, only requires suppression where the defendant is rendered incapable of giving a voluntary statement or waiver. *Id.*

Like *McCray*, the defendant and the officers here spoke to each other in a casual manner, the defendant was clear in his statements and responses, he clarified items and even corrected the officers (Exh. 4). There was no evidence whatsoever that the defendant's will was overborne due to supposed intoxication (Exh. 4). The defendant requested the opportunity to have a cigarette, and he was allowed to smoke (C.A. 5-6). He asked for water and received it (Exh. 4). He knew to ask whether he was going to be released (C.A. 6-7). He had the presence of mind to know the difference between a "straight warrant" and a default warrant (Exh. 3). Viewing the video, it strains credulity to suggest that, under these circumstances, the defendant's intoxication rendered his coherent and cogent statements to the police

involuntary, or that Sergeant Detective Stratton knew or should have known that the defendant was too intoxicated to validly waive his rights (C.A. 9). *See Commonwealth v. Dunn*, 407 Mass. 798, 803-805 (1990) (police officers may rely on defendant's outward appearance of sobriety when deciding whether to proceed with interrogation). *Contrast Silanskas*, 433 Mass. at 682-83, 685-86 (although officer "detected an odor of alcohol on defendant's breath and he noted that defendant was under the influence of alcohol," waiver was valid where "defendant's answers to the inquires made of him were responsive, coherent, and "'quite self-serving'"). Thus, this Court should reverse the motion judge's order and find that the defendant voluntarily waived his *Miranda* rights before speaking with the homicide detectives.

B. The Motion Judge Erred in Suppressing the Results of Forensic Testing on the Defendant's Clothing.

Judge Salinger also erred in allowing the defendant's motion to suppress the results of the forensic testing on the defendant's lawfully seized clothes (C.A. 10). Judge Salinger correctly found that the police properly seized the defendant's clothing (C.A. 10), but then inexplicably suppressed the forensic testing because the police did not obtain

a search warrant before proceeding with the testing (C.A. 10-11). The motion judge's ruling wholly ignores the Supreme Judicial Court's decision in *Arzola*, 470 Mass. at 814-820, which holds that a warrant is not needed in order to conduct DNA testing on lawfully seized evidence. More specifically, the Court found that:

> [a] defendant generally has a reasonable expectation of privacy in the shirt he or she is wearing, but where, as here, the shirt is lawfully seized, a defendant has no reasonable expectation of privacy that would prevent the analysis of that shirt to determine whether blood found on it belonged to the victim or to the defendant.

Id. at 817. The Court concluded that:

> where, as here, DNA analysis is limited to the creation of a DNA profile from lawfully seized evidence of a crime, and where the profile is used only to identify its unknown source, the DNA analysis is not a search in the constitutional sense. Therefore, no search warrant was required to conduct the DNA analysis of the bloodstain from the defendant's clothing that revealed that the victim was the source of the blood.

Id. at 820.

The *Arzola* decision is in line with well-settled jurisprudence that the police do not need to secure a search warrant to conduct forensic testing of lawfully seized evidence. Indeed, "the Supreme Judicial Court has concluded that where the police have lawfully obtained evidence, it may be subjected to scientific

testing." *Commonwealth v. Aviles*, 58 Mass. App. Ct. 459, 463 (2003) (defendant's motion to suppress warrantless DNA testing results of clothing that revealed defendant's sperm and DNA properly denied). *See also Commonwealth v. Robles*, 423 Mass. 62, 65 n.8 (1996). In *Robles*, the defendant was convicted of first degree murder, armed robbery, and unlawful possession of a firearm. The police recovered the coat the defendant had worn the night of the murder, and had it forensically tested for blood, without a warrant. In unequivocal language, the Supreme Judicial Court stated that the defendant's argument that a warrant was necessary for chemical analysis of the coat was "without merit". *Id. at 65, n.8. See also Commonwealth v. Varney*, 391 Mass. 34, 38-39 (1984) (court explicitly refused to hold that police must obtain a warrant before lawfully obtained evidence can be subject to scientific testing). Here, where the defendant's clothing was lawfully seized, no search warrant was required and the motion judge's suppression of the results of the forensic testing must be reversed.

IV. CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that the Single Justice hear its appeal and reverse the lower court's order allowing the motion to suppress statements and evidence. In the alternative, the Commonwealth requests that it be allowed to appeal the order to the Appeals Court.

Respectfully submitted,
FOR THE COMMONWEALTH

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December 30, 2015

COMMONWEALTH'S APPENDIX

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

SUFFOLK, ss: SJC-2015-_____

COMMONWEALTH

v.

RANDALL TREMBLAY

DEFENDANT'S OPPOSITION TO COMMONWEALTH'S APPLICATION REQUESTING SINGLE JUSTICE TO REVERSE ORDER OF SUFFOLK SUPERIOR COURT ALLOWING DEFENDANT'S MOTION TO SUPPRESS

The defendant hereby opposes the Commonwealth's application asking the Single Justice to reverse the Order of the Suffolk Superior Court allowing in part the defendant's Motion to Suppress his custodial statements, as well as the results of forensic testing of clothing seized from the defendant. The defendant also opposes the Commonwealth's alternative request that it be allowed to appeal the Order to the Appeals Court.

The Commonwealth, in its pleadings, has submitted a Statement of Facts that goes considerably beyond the actual findings of fact by the Superior Court. To the degree that this Statement of Facts exceeds the findings of the Superior Court, or any documentary evidence submitted during the hearing on this Motion to Suppress, the defendant contends that the facts found by the Superior Court, and the documentary evidence submitted at that Hearing, should be the limit of any facts considered by the Single Justice.

The defendant further notes that although the Commonwealth submitted a DVD copy of the defendant's interview with the Boston Police that was the subject of the Motion to Suppress, the Commonwealth failed to submit a second DVD, admitted in evidence as Exhibit 9[1], and viewed by Justice Salinger during the hearing, that showed the defendant at an MBTA station a few hours before his arrest on the evening of November 17-18, 2014. Just as this Court may take "an independent review" of documentary evidence such as the recording of the defendant's interview, this Court may also independently review the MBTA video that was introduced and viewed by the Superior Court. *Commonwealth* v. *Clarke*, 461 Mass. 336, 340 (2012).

The Superior Court was correct is suppressing both of the defendant's post-arrest statements.

The Commonwealth spends considerable time belittling the findings of fact and law by Justice Salinger when he considered this case and suppressed the statements of the defendant. However, his findings are not only consistent with the documentary evidence, they are compelled by that evidence and by the testimony he heard during the hearing. The MBTA video shows the defendant, around midnight, drinking beer from a bag. He is stumbling, weak-kneed, and gesticulating during the time he is on that video. He is clearly heavily intoxicated at that time. The video of his second interview is even more conclusive that the defendant was not simply intoxicated, but was too intoxicated to waive or understand his Miranda rights. Justice Salinger viewed and listened to that interview several times, and based on that careful consideration of the evidence found

[1] A copy of the MBTA video recordings, Exhibit 9, comprising two videos without sound, is appended to this opposition.

that the defendant "was quite intoxicated throughout that interview and that he did not knowingly and intelligently waive his *Miranda* rights." C.A.6[2]

Justice Salinger inferred that the defendant must have been even more intoxicated during the first, unrecorded interview. C.A.8. As stated in *Commonwealth* v. *Osachuk*, 418 Mass. 229, 235 (1994), the Commonwealth bears the burden of rebutting the presumption of taint of the second interview either by showing "a break in the stream of events that sufficiently insulated the post-Miranda statement from the tainted one," or that the involuntary statement was not incriminatory. As Justice Salinger noted, not only was there not a break in the stream of events, but the interrogating officer strove to immediately return him to the interview room to get a recorded statement; in so doing, the officer failed to determine, or inquire into, whether he was intoxicated or able to understand the rights he was waiving. C.A.5-6, & 10. In carefully assessing all the evidence, Justice Salinger found that the defendant was too intoxicated in the first interview to waive his Miranda rights, that the failure to record that statement left "substantial doubt" about whether he made a knowing and intelligent waiver during that first interview, and that the police could not cure that problem by an immediate effort at a second interview. C.A. 10. In any case, Justice Salinger found that the recorded interview showed that the defendant was in fact too intoxicated in the second interview to waive his Miranda rights, independent of the *Osachuk* "cat out of the bag" analysis. C.A. 9-10.

The reading of *Miranda* warnings to an intoxicated individual is not a talisman that immediately renders any subsequent statement to be voluntary or intelligent, no matter the degree of intoxication. The Commonwealth asserts that intoxication alone is

[2] References are to Commonwealth's appendix, cited as (C.A. __).

not enough to justify suppression of a statement. However, the cases the Commonwealth cites stand for the simple proposition that the mere fact that a defendant is, in some form, intoxicated is not sufficient to suppress a statement; it is the level of intoxication, and whether that level of intoxication renders a defendant unable to understand or intelligently waive his rights, that is the question. *Commonwealth* v. *Hosey*, 368 Mass. 571, 577 – 79 (1975). The Commonwealth ignores the *Hosey* decision, in which the suppression of a statement was required under remarkably similar circumstances, as argued in the defendant's supplemental brief after the suppression hearing. C.A. 30-31. The Commonwealth also evades its burden to "demonstrate voluntariness beyond a reasonable doubt, and evidence of this must affirmatively appear from the record. Although intoxication alone is insufficient to negate an otherwise voluntary act, special care is taken to review the issue of voluntariness where the defendant claims to have been under the influence of drugs or alcohol." *Commonwealth* v. *Mello*, 420 Mass. 375, 382 – 83 (1995) (citing *Commonwealth* v. *Parham*, 390 Mass. 833, 838 (1984); *Commonwealth* v. *Doucette*, 391 Mass. 443, 448 (1984)).

Justice Salinger carefully considered the documentary and testimonial evidence presented to him, and wrote a reasoned and thoughtful decision fully consistent with the testimonial evidence he credited and the documentary evidence he viewed. He held the Commonwealth to its burden, that it "must demonstrate voluntariness beyond a reasonable doubt, and evidence of this must affirmatively appear from the record. *Mello*, 420 Mass. at 383 (citing *Parham*, 390 Mass. at 838). There is no basis for reversal of this decision suppressing the defendant's two custodial statements.

The Superior Court was correct in suppressing the DNA testing of the defendant's clothing as the fruit of the involuntary statements.

The Commonwealth claims that Justice Salinger "inexplicably" suppressed the forensic testing of clothing seized from the defendant after his interrogations. The Commonwealth cites *Commonwealth* v. *Arzola*, 470 Mass. 809, 817 (2015) for the proposition that DNA testing of legally-seized clothing does not require a search warrant. What makes Justice Salinger's decision to suppress that forensic testing "explicable" is that the suppression is based on the testing being the fruit of the suppressed statements. Justice Salinger stated that the police only had probable cause to arrest the defendant based on his statements, which were obtained illegally. "The Commonwealth presented no evidence and made no argument that the police still had probable cause to arrest Tremblay for murder without considering his confession during the two custodial interrogations." C.A. 10. His arrest for the warrant for failing to register as a sex offender did not justify the seizure of the clothing because such a seizure would not have led to evidence related to that charge, and there was no basis for such a seizure to remove weapons. C.A. 11.

The defendant's motion to suppress, at paragraph 3, includes a claim that "the second interview, and any collection of evidence as a result of these interviews, must be suppressed..." as the illicit product of the first involuntary statement. C.A. 18. The defendant further asserted in paragraph 4 that the seizure was not the product of a legitimate search incident to arrest, of probable cause, or of any exigency allowing for such a seizure without a search warrant. It is well established that if a statement is

suppressed, and the police used that illegal statement to locate or identify evidence, that the discovery of that evidence was the "fruit of the poisonous tree" and is also to be suppressed. *Commonwealth v. Dimarzio*, 436 Mass. 1012, 1013 (2002). If the discovery of evidence occurs as a fruit of an illegally-obtained statement, the Commonwealth bears the burden of proving by a preponderance of the evidence that the discovery of that evidence would otherwise be inevitable, "that the discovery by lawful means was certain as a practical matter." *Id.*

The Commonwealth failed to establish that the clothing would have been seized because its discovery by lawful means was inevitable as a practical matter. If Justice Salinger erred in his decision regarding the clothing, he erred in holding that exigency would have justified the securing of the clothing because the police saw the blood and acted to secure the clothing to prevent its destruction. C.A. 11. The Commonwealth failed to establish evidence that the blood would have been discovered by the police independently of his involuntary statements. The blood stains were not obvious, and only became evident during the interviews and the subsequent processing for forensic evidence, which included photographs and the seizure of the clothing. Because the defendant was only legally arrested for the warrant concerning his failure to register as a sex offender, that would not have justified seizing the clothing as evidence of that crime. The police did not have any other basis to view any blood that they might have seen as evidentiary without his statements. The Commonwealth bore the burden of establishing the inevitability of the seizure of the clothing independent of his involuntary statements, and failed to present sufficient evidence to meet that burden.

Whether exigent circumstances justify a warrantless search or seizure does not remove the other requirements for a seizure to be legal, including probable cause or some other basis for the seizure. *Commonwealth* v. *Tyree*, 455 Mass. 676, 684 (2010). Moreover, to justify a seizure based on exigency, the Commonwealth must show that it was impracticable to obtain a warrant, and the standards for showing this exigency are strict. *Id.* Further, when the exigency is based on a fear of destruction of evidence, there must be a reasonably objective basis to believe that the evidence was susceptible to destruction or removal. *Id.* at 686, and cases cited. The Commonwealth failed to meet this burden in this case. The defendant was arrested for the warrant and was going to remain in custody, in a cell, overnight at least. The opportunity to get a search warrant existed without a risk of destruction of the evidence. See *Commonwealth* v *Taylor*, 426 Mass. 189, 195 (1997) (police could detain person until could get search warrant for clothing to test for accelerants). There was no showing that the clothing, or blood stains, were susceptible to destruction. See *Commonwealth* v. *Williams*, 76 Mass. App. Ct. 489, 492 – 93 (2010) (no exigency to seize clothing of defendant at hospital to preserve evidence); *Commonwealth* v. *DeGeronimo*, 38 Mass. App. Ct. 714 (1995) (50 minutes enough time for police at crash scene to get search warrant for defendant to secure evidence of intoxication). Most importantly, there was no independent showing of probable cause to seize the clothing once the statements were removed from the equation. For these reasons, the Commonwealth failed to establish that the seizure of the clothing was inevitable based on probable cause without consideration of his involuntary statements, and failed to meet the strict requirements for exigency even if the seizure of the clothing could be viewed as not a fruit of his statements.

Because the testing of the clothing was suppressed under a fruit of the poisonous tree analysis, the *Arzola* holding is inapposite. This is not a question of whether the police could test clothing legally seized without a warrant, but instead whether the Commonwealth met its burden of showing that the seizure AND testing of the clothing was inevitable independently of the defendant's involuntary statements. The suppression of evidence that is the fruit of an illegality does not rest on whether the discovery or seizure of that evidence was otherwise a violation of a defendant's privacy or other rights. *See., e.g., United States* v. *Brignoi-Ponce*, 422 U.S. 873 (1975) (statement after illegal car stop suppressed as fruit); *Harrison* v. *United States*, 392 U.S. 219 (1968) (D's testimony at first trial was coerced by errors in trial, suppressed in second trial); *Commonwealth* v. *Charros*, 443 Mass. 752, 766 (2005) (D's testimony at first trial to explain illegally admitted evidence tainted and barred at subsequent trial); *Commonwealth* v. *Lahti*, 398 Mass. 829 (witnesses identified because of coerced statement of D was fruit). Even if the clothing could be seized under some theory of exigency, the exigency limits the scope of any search or seizure. *See Commonwealth* v. *Dejarnette*, 75 Mass. App. Ct. 88, 94 - 95 (2009) (exigency only justified search in residence for person with warrant, not any further search). Any exigency would not justify the subsequent DNA testing of the clothing absent a warrant, and the DNA testing is clearly a fruit of the defendant's involuntary statements both because the seizure and the testing were not shown to be inevitable absent the statements.

The seizure of the clothing, and the subsequent DNA testing of that clothing, was the fruit of the involuntary statements of the defendant, and the Commonwealth failed to establish that either would have inevitably occurred without those statements. As such,

the seizure of that clothing, any observations of that clothing, and the ultimate testing of that clothing must be suppressed as a fruit. There is therefore no basis to reverse this holding of Justice Salinger, because the only possible error in that ruling was his holding that the seizure, but not subsequent testing, was justified under an exigency.

RANDALL TREMBLAY
By his Attorney,

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2015-0561

Suffolk Superior Court
No.1584CR10151

COMMONWEALTH

v.

RANDALL TREMBLAY

ORDER ALLOWING APPLICATION
FOR INTERLOCUTORY APPEAL

This matter came before the Court, Hines, J., on the Commonwealth's application for leave to file an interlocutory appeal pursuant to Mass. R. Crim. P. 15(a)(2) filed on December 30, 2015.

In accordance with Commonwealth v. Jordan, 469 Mass. 134 (2014), the notice of appeal and application were timely filed.

Upon consideration, it is ORDERED that the interlocutory appeal shall proceed in the Appeals Court and that the Criminal Clerk's Office of the Suffolk Superior Court shall assemble the record in 1584CR10151 and transmit the record to the Clerk's Office of the Appeals Court, John Adams Courthouse, One Pemberton Square, Room 1-200, Boston, Massachusetts 02108-1705.

By the Court, (Hines, J.)

Maura S. Doyle, Clerk

Entered: January 20, 2016

C.A. 97

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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

SUFFOLK, ss: SJ-2016-

COMMONWEALTH

v.

RANDALL TREMBLAY

DEFENDANT'S APPLICATION FOR LEAVE TO CROSS-APPEAL ORDER DENYING IN PART MOTION TO SUPPRESS, AND MOTION TO CONSOLIDATE WITH COMMONWEALTH'S APPEAL

Now comes the defendant and respectfully moves pursuant to Rule 15(a)(2) to include his cross-appeal with the Commonwealth's appeal of the trial court's order allowing in part and denying in part of his Motion to Suppress. On January 20, 2016, the Single Justice allowed the Commonwealth's Rule 15(a)(2) application for interlocutory appeal; the defendant now requests a cross-appeal of the part of the Motion to Suppress that was denied, and consolidation with the Commonwealth's appeal, so that the motion may be considered as a whole rather than piecemeal.

Pursuant to Commonwealth v. Jordan, 469 Mass. 134, 147-48 (2014), defense counsel states that a Notice of Interlocutory Cross-Appeal was filed in the lower court on December 31, 2104, within 10 days of the issuance of notice of the trial court's order on December 21; this Application is being filed with a Motion to Enlarge Time For Filing.[1]

[1] The Commonwealth's application for interlocutory appeal, docket SJ-2015-0561, included an appendix with the relevant papers (cited as "C.A.__"). This application includes as an attachment only the trial court's written findings on the motion to suppress, but any further documents are available upon request.

Pursuant to the Standing Order Concerning Applications to the Single Justice Pursuant to Mass. R. Crim. P. 15(a)(2), defense counsel states the following:

1. The trial court docket number is SUCR 2015-10151.
2. The trial court made written findings which are summarized below and attached to this Application.
3. A Memorandum of Law is attached.
4. The length of trial is up to the Commonwealth; likely one to three weeks.
5. The case is stayed pending the Commonwealth's interlocutory appeal, which has not yet been docketed.
6. The prosecutors in this matter are ADAs Amy Galatis and Janis Smith, One Bulfinch Place, Boston, MA 02114; 617-619-4000.

MEMORANDUM OF LAW

The Single Justice has already allowed the Commonwealth's application for an interlocutory appeal. The order in question allowed in part and denied in part the defendant's Motion to Suppress, suppressing his statements after being arrested but not before, and the results of forensic testing on his clothes but not the clothes themselves. Now the defendant respectfully seeks consideration of the part of the Motion that was denied, so that the Appeals Court may consider the entirety of the Motion to Suppress, with issues that are intertwined with those already before the Court on the Commonwealths' interlocutory appeal.

PROCEDURAL HISTORY

The defendant is charged by indictment with two offenses: (1) Murder, pursuant to G.L. c. 265, § 1; and (2) Violating an Abuse Prevention Order, pursuant to G.L. c.

209A, § 7. On September 29, 2015, the defendant filed a Motion to Suppress, with memorandum and affidavit. On November 24, 2015, the Commonwealth filed a Memorandum in Opposition. On November 30, 2015, a judge of the Superior Court conducted an evidentiary hearing on the motion. On that date the defendant also filed a supplemental Memorandum in Support of Motion to Suppress. Following the hearing, on December 9, 2015, the Commonwealth submitted a supplemental Memorandum in Opposition.

On December 20, 2015, the judge issued an order allowing in part and denying in part the Motion to Suppress. The court's notice was generated and sent to the parties the next day, December 21. On December 29, the Commonwealth filed a Notice of Interlocutory Appeal in the Superior Court, and on December 30, the Commonwealth filed an Application Requesting the Single Justice Reverse the Order of the Suffolk Superior Court Allowing the Defendant's Motion to Suppress. On January 8, 2016, the defendant filed an Opposition to the Commonwealths' Application to the Single Justice. On January 20, 2016, the Single Justice ordered that the Commonwealth's interlocutory appeal shall proceed in the Appeals Court.

Meanwhile, on December 31, ten days after issuance of the notice of the motion judge's decision, the defendant filed a Notice of Interlocutory Cross-Appeal in the Superior Court.

EVIDENCE AT THE MOTION HEARING

Three officers testified at the motion hearing on November 30, 2015, and the parties submitted a number of exhibits. Because the motion judge's factual findings are

for the most part thorough and correct, the defendant will only provide a short summary here.

In the early morning of November 18, 2014, the police received a call for a woman who had died in the Hyde Park section of Boston. The police arrived and found the bloody body of a woman lying dead on a couch. The police spoke with several people on scene and later found Randall Tremblay outside, first mumbling to himself and later yelling on the sidewalk, "I know what happened" and "she was my friend." They knew Mr. Tremblay had a warrant out for his arrest on unrelated charges of failing to register as a sex offender, and so once they determined his identity, they arrested him. Mr. Tremblay disputed the validity of the warrant and asked to be released, as he continued to do throughout the morning.

The police took Mr. Tremblay to headquarters and interviewed him twice, with the second time necessary because the first time they failed to record the interview. During both interviews Mr. Tremblay made incriminating statements about killing the woman whose body the police had found. Mr. Tremblay was heavily intoxicated, as demonstrated by his demeanor and statements in his second (video recorded) interview, by his demeanor in video of him drinking at an MBTA station several hours beforehand, by his statements admitting to continue to drink between being at the MBTA station and the police arriving, and by continued belief that the police would release him once he sorted out the warrant for failure to register, despite his confessions to homicide.

Based on his statements, the police arrested Mr. Tremblay for murder. They took him to another part of the station for full photographs, going beyond the standard booking photos. The police looked and found small stains of apparent blood on one of his

sneakers and one of his socks, and they seized all of the clothing that he was wearing and later performed forensic tests on the spots without a warrant.

The motion judge denied the motion in part and allowed it in part. He found that the Commonwealth did not meet its burden of proving that Mr. Tremblay made a knowing and intelligent waiver of his Miranda rights, and therefore suppressed all his statements made after his arrest. He also suppressed the forensic testing of the clothes, but not the clothes themselves, finding that the police did not have probable cause to arrest Mr. Tremblay for murder without his improperly obtained statements, and could not seize the clothes incident to arrest only for failure to register as a sex offender, but could seize them under the exigency exception once the blood stains were observed, although could not perform forensic testing on them under the exigency exception. He did not make any findings about the exact timing of finding the blood stains, however, nor whether the police would have searched for and found the blood stains absent Mr. Tremblay's statements.

ARGUMENT

I. The administration of justice will be facilitated by interlocutory appeal because the parts of the Motion to Suppress that were allowed (the subjects of the Commonwealth's interlocutory appeal) are intertwined with the parts that were denied (the subjects of this cross-appeal).

The Commonwealth's interlocutory appeal has already been accepted, targeting the judge's suppression of the defendant's custodial statements and the forensic testing of his clothes. The defendant now seeks to challenge whether those clothes were properly seized and searched in the first place, an issue that is heavily tied up with the judge's ruling on the testing of those clothes. It will be most efficient to consider those issues together rather than in piecemeal appeals.

II. The motion judge erred in not suppressing the clothes.

Although the motion judge correctly suppressed the testing of the defendant's clothing, the judge should have gone further and suppressed the clothing itself. The defendant's motion to suppress, at paragraph 3, includes a claim that "the second interview, and any collection of evidence as a result of these interviews, must be suppressed..." as the illicit product of the first involuntary statement. C.A. 18. The defendant further asserted in paragraph 4 that the seizure was not the product of a legitimate search incident to arrest, of probable cause, or of any exigency allowing for such a seizure without a search warrant.

It is well established that if a statement is suppressed, and the police used that illegal statement to locate or identify evidence, that the discovery of that evidence was the "fruit of the poisonous tree" and is also to be suppressed. Commonwealth v. Dimarzio, 436 Mass. 1012, 1013 (2002). If the discovery of evidence occurs as a fruit of an illegally-obtained statement, the Commonwealth bears the burden of proving by a preponderance of the evidence that the discovery of that evidence would otherwise be inevitable, "that the discovery by lawful means was certain as a practical matter." Id.

The Commonwealth failed to establish that the clothing would have been seized because its discovery by lawful means was inevitable as a practical matter. Justice Salinger therefore erred in holding that exigency would have justified the securing of the clothing because the police saw the blood and acted to secure the clothing to prevent its destruction. C.A. 11. The evidence did not show that the blood would have been discovered by the police independently of his involuntary statements. The blood stains were not obvious, and only became evident during the interviews and the subsequent

processing for forensic evidence, which included photographs and the seizure of the clothing. Because the defendant was only legally arrested for the warrant concerning his failure to register as a sex offender, that would not have justified seizing the clothing as evidence of that crime. The police did not have any other basis to view any blood that they might have seen as evidentiary without his statements. The Commonwealth bore the burden of establishing the inevitability of the seizure of the clothing independent of his involuntary statements, and failed to present sufficient evidence to meet that burden.

Whether exigent circumstances justify a warrantless search or seizure does not remove the other requirements for a seizure to be legal, including probable cause or some other basis for the seizure. Commonwealth v. Tyree, 455 Mass. 676, 684 (2010). Moreover, to justify a seizure based on exigency, the Commonwealth must show that it was impracticable to obtain a warrant, and the standards for showing this exigency are strict. Id. Further, when the exigency is based on a fear of destruction of evidence, there must be a reasonably objective basis to believe that the evidence was susceptible to destruction or removal. Id. at 686, and cases cited. The Commonwealth failed to meet this burden in this case. The defendant was arrested for the warrant and was going to remain in custody, in a cell, overnight at least. The opportunity to get a search warrant existed without a risk of destruction of the evidence. See Commonwealth v Taylor, 426 Mass. 189, 195 (1997) (police could detain person until could get search warrant for clothing to test for accelerants). There was no showing that the clothing, or blood stains, were susceptible to destruction. See Commonwealth v. Williams, 76 Mass. App. Ct. 489, 492 – 93 (2010) (no exigency to seize clothing of defendant at hospital to preserve evidence); Commonwealth v. DeGeronimo, 38 Mass. App. Ct. 714 (1995) (50 minutes

enough time for police at crash scene to get search warrant for defendant to secure evidence of intoxication). Most importantly, there was no independent showing of probable cause to seize the clothing once the statements were removed from the equation. For these reasons, the Commonwealth failed to establish that the seizure of the clothing was inevitable based on probable cause without consideration of his illegally obtained statements, and failed to meet the strict requirements for exigency even if the seizure of the clothing could be viewed as not a fruit of his statements.

The seizure of the clothing, and the subsequent DNA testing of that clothing, were both the fruit of the involuntary statements of the defendant, and the Commonwealth failed to establish that either would have inevitably occurred without those statements. As such, the seizure of that clothing and any observations of that clothing should be suppressed along with the testing of the clothing.

CONCLUSION

The defendant respectfully requests leave to file an interlocutory cross-appeal of the denial in part of the motion to suppress, and to consolidate it with the Commonwealth's appeal. The administration of justice will be facilitated by the interlocutory cross-appeal because the issues are intertwined with those already involved in the Commonwealth's interlocutory appeal.

RANDALL TREMBLAY
By his Attorney,

_____

John C. Hayes
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CERTIFICATE OF SERVICE

I, John Hayes, the undersigned, do hereby certify under the pains and penalties of perjury that I have today, February 11, 2016, made service on Commonwealth's counsel by sending a copy of the attached *Defendant's Application for Leave to Cross-Appeal Order Denying in Part Motion to Suppress and Motion to Consolidate with Commonwealth's Appeal* by first-class mail to Amy Galatis, Esq.

_____

John Hayes, BBO#557555
Committee for Public Counsel Services

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

SUFFOLK, ss: SJ-2016-

COMMONWEALTH

v.

RANDALL TREMBLAY

MOTION TO WAIVE FILING FEE

Now comes the defendant and respectfully moves this Honorable Court to waive the fee normally required for an Application for Leave for Interlocutory Appeal. In support thereof, counsel states that Mr. Tremblay has been found indigent by the trial court and the Committee for Public Counsel Services, of which counsel is an employee, has been appointed to represent him. Mr. Tremblay is also currently incarcerated.

RANDALL TREMBLAY
By his Attorney,

John C. Hayes
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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

SUFFOLK, ss: SJ-2016-

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v.

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AFFIDAVIT IN SUPPORT OF MOTION TO WAIVE FILING FEE

I, John Hayes, state that the following is true to the best of my knowledge, information, and belief:

1. I am an attorney for the Committee for Public Counsel Services.

2. Mr. Tremblay has been found indigent, and I have been appointed to represent him.

3. Mr. Tremblay is also currently incarcerated at the Middlesex House of Correction at Billerica, and is therefore unable to work.

Signed under the pains and penalties of perjury, this 9th of February, 2016.

_____
John Hayes

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

SUFFOLK, ss: SJ-2016-

COMMONWEALTH

v.

RANDALL TREMBLAY

DEFENDANT'S MOTION TO ENGLARGE TIME FOR FILING APPLICATION FOR LEAVE TO CROSS-APPEAL

Now comes the defendant in the above-captioned matter and hereby moves this Honorable Court, pursuant to Rules 2 and 14(b) of the Massachusetts Rules of Appellate Procedure, for an order permitting him to file his Application for Leave to Cross-Appeal late. As grounds therefore, defendant states that a Notice of Interlocutory Cross-Appeal has been filed within the expiration of time therefor, and there is good cause to permit the late filing of the Application for Leave to Cross-Appeal.

RANDALL TREMBLAY
By his Attorney,

John C. Hayes
BBO# 557555
COMMITTEE FOR PUBLIC COUNSEL SERVICES
One Congress Street, Suite 102
Boston, MA 02114
(617) 209-5500

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

SUFFOLK, ss: SJ-2016-

COMMONWEALTH

v.

RANDALL TREMBLAY

AFFIDAVIT IN SUPPORT OF MOTION TO ENGLARGE TIME

I, John Hayes, state that the following is true to the best of my knowledge, information, and belief:

1. I am an attorney for the Committee for Public Counsel Services.

2. Mr. Tremblay has been found indigent, and I have been appointed to represent him.

3. On December 20, 2015, the judge issued his order allowing in part and denying in part the defendant's Motion to Suppress. The Court issued notice of the decision the next day, December 21, 2015.

4. On December 29 and 30, 2015, the Commonwealth filed its notice of appeal in the Superior Court and application for leave to appeal with the Single Justice.

5. On December 31, 2015, the defense filed a Notice of Interlocutory Cross-Appeal in the Superior Court.

6. On January 20, 2016, the Single Justie allowed the Commonwealth's application and ordered that the case proceed in the Appeals Court.

7. Upon consideration after receving notice of this, and after consulation with staff in our Appeals Unit, I now desire to consolidate the full issues raised by the Motion to Suppress and hereby file this request for an enlargement of time to file the Application.

Signed under the pains and penalties of perjury, this 9th of February, 2016.

_____

John Hayes

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COUR
FOR SUFFOLK COUNTY
No. SJ-2016-0057

Suffolk Superior Court
No.SUCR2015-10151

COMMONWEALTH

v.

RANDALL TREMBLAY

ORDER ALLOWING APPLICATION
FOR INTERLOCUTORY APPEAL

This matter came before the Court, Cordy, J., on the defendant's application for leave to file an interlocutory appeal pursuant to Mass. R. Crim. P. 15(a)(2) filed on February 12, 2016.

In accordance with Commonwealth v. Jordan, 469 Mass. 134 (2014), the threshold procedural motion for late filing shall be addressed first. Upon consideration, it is ORDERED that the defendant's motion for permission to file the application late be, and hereby is, ALLOWED.

It is FURTHER ORDERED that the interlocutory appeal shall proceed in the Appeals Court and shall be consolidated with the Commonwealth's interlocutory appeal (SJ-2015-0561) concerning the same trial court order and that the Criminal Clerk's Office

of the Suffolk Superior Court shall assemble the record in SUCR2015-10151 and transmit the record to the Clerk's Office of the Appeals Court, John Adams Courthouse, One Pemberton Square, Room 1-200, Boston, Massachusetts 02108-1705.

By the Court, (Cordy, J.)

Maura S. Doyle, Clerk

Entered: February 24, 2016

APPEALS COURT
Full Court Panel Case
Case Docket

COMMONWEALTH vs. RANDALL D. TREMBLAY
2016-P-0981

CASE HEADER			
Case Status	No briefs yet	**Status Date**	07/19/2016
Nature	Crime Against Public Order	**Entry Date**	07/19/2016
Sub-Nature	Allowance in part of deft. motio	**SJ Number**	
Appellant	Both Plf & Deft	**Case Type**	Criminal
Brief Status	Awaiting blue brief	**Brief Due**	08/29/2016
Panel		**Argued/Submitted**	
Citation		**Decision Date**	
Lower Court	Suffolk Superior Court	**TC Number**	
Lower Ct Judge	Kenneth W. Salinger, J.	**TC Entry Date**	03/10/2015
FAR Number		**SJC Number**	

INVOLVED PARTY	ATTORNEY APPEARANCE
Commonwealth Plaintiff/Appellant Awaiting blue brief	John P. Zanini, A.D.A. Withdrawn Janis DiLoreto Smith, A.D.A.
Randall D. Tremblay Defendant/Appellee Awaiting red brief	John C. Hayes, Esquire Rebecca Kiley, Esquire

DOCKET ENTRIES

Entry Date	Paper	Entry Text
07/19/2016		Transcripts received: 1 Vol on 1 CD ^ 11/30/15 Motion Hearing
07/19/2016	#1	Lower Court Assembly of the Record Package
07/19/2016	#2	Notice of entry sent.
07/19/2016		**** Cross Appeal ****
07/22/2016	#3	Notice of appearance of Rebecca Kiley for Randall D. Tremblay.
07/28/2016	#4	Docketing Statement received from Commonwealth. ^
07/28/2016	#5	Notice of change of counsel of John P. Zanini, A.D.A. with Janis DiLoreto Smith, A.D.A..
08/09/2016	#6	Docketing Statement received from Randall D. Tremblay ^

As of 08/11/2016 20:01

CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k).

JANIS DILORETO SMITH
Assistant District Attorney

No. 2016-P-0981

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

COMMONWEALTH OF MASSACHUSETTS,
Appellant,

V.

RANDALL D. TREMBLAY,
Defendant-Appellee

BRIEF AND APPENDIX FOR THE COMMONWEALTH ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

SUFFOLK COUNTY